SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-233

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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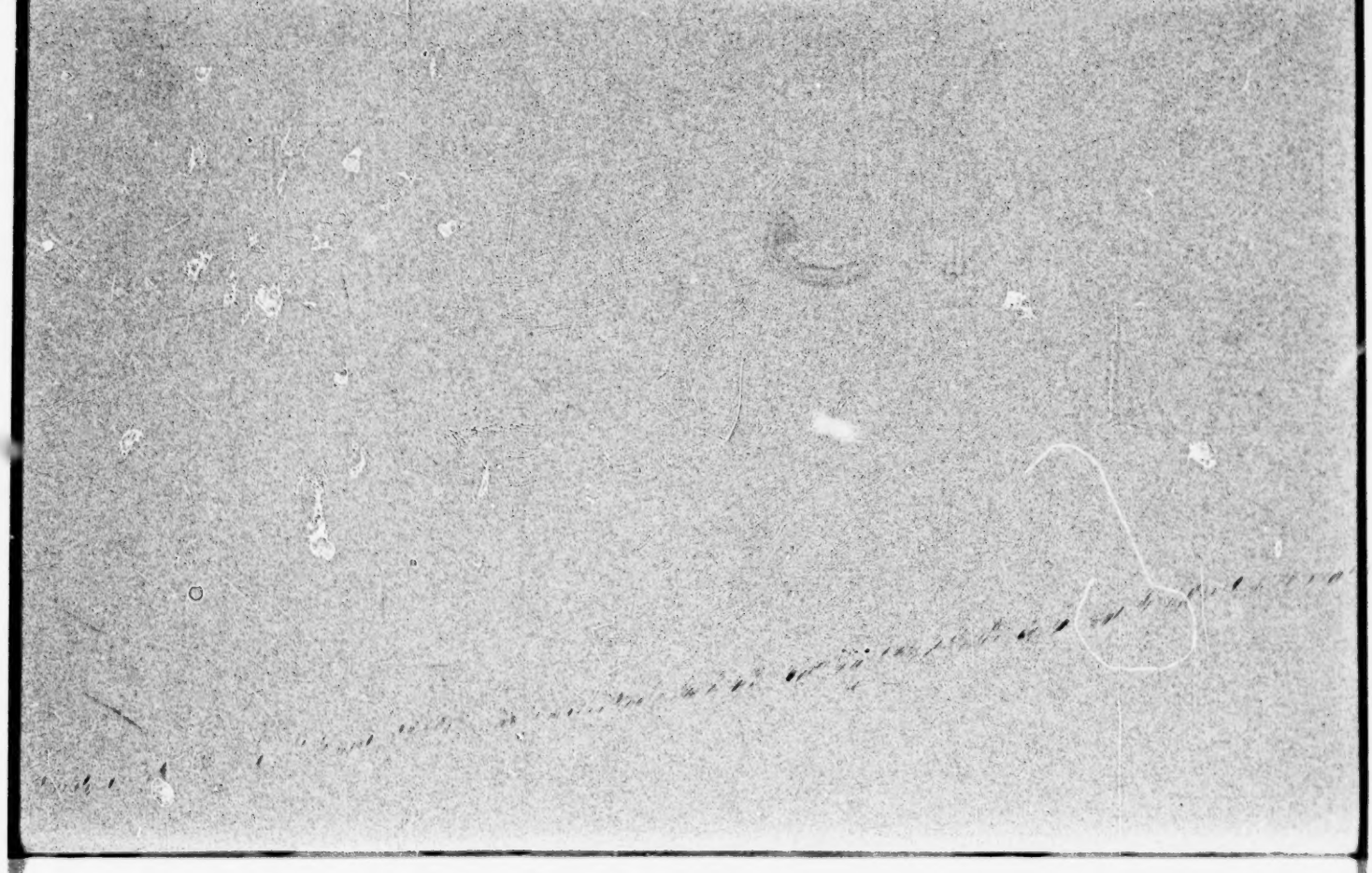

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OF THE STATE OF MARYLAND, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Department of Transportation of the State of Maryland prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 6, 1974, affirming an order of the Civil Aeronautics Board adopted February 6, 1973 and affirmed by the Civil Aeronautics Board on reconsideration on July 5, 1973.[1]

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[1] Petitions for review of the same order of the Civil Aeronautics Board by the Department of Transportation of the State of Maryland and the Commonwealth of Virginia were consolidated in the United States Court of Appeals for the Fourth Circuit. The Commonwealth of Virginia is also petitioning this Court for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported at this writing; it is printed in Appendix A hereto, page 1a. The orders and opinions of the Civil Aeronautics Board are unreported and are printed in Appendix B hereto at pages 86a to 135a. The Initial Decision of the Administrative Law Judge is unreported and is printed in Appendix B hereto at page 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on June 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Whether, having found that the shippers of air freight in Maryland directly compete with those in the New York area for European business, the Civil Aeronautics Board must as a matter of law require equal rates between both areas and Europe.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory provisions involved are as follows and are contained in Appendix C hereto:

Constitution of the United States, Article I, section 9, clause 6, Appendix C, page 136a.

Federal Aviation Act of 1958:

§ 404(b) [49 U.S.C. § 1374(b)], Appendix C, page 136a.

§§ 1002(f) [49 U.S.C. § 1482(f)], Appendix C, page 137a.

Interstate Commerce Act:

Sec. 3 [49 U.S.C. 3], Appendix C, page 137a.

Sec. 216 [49 U.S.C. 216], Appendix C, page 138a.

STATEMENT OF THE CASE

This case involves the validity of the air freight rate structure between the United States and Europe, primarily with reference to the relationship of those rates as between New York, on the one hand, and Baltimore, Washington, and Philadelphia, on the other hand. The case originated with a complaint by Baltimore filed on November 29, 1968, and a resulting order of the Civil Aeronautics Board inaugurating a formal investigation with respect to Baltimore, Washington, Philadelphia and New York (Appendix B, page 87a). Subsequently the case was expanded by interventions to include Boston, Chicago, Cleveland, and Detroit.

The transatlantic air freight rate structure is prescribed by resolutions of the International Air Transport Association (IATA), which includes in its membership most of the foreign flag air carriers serving the United States and all of the U.S. flag carriers serving Europe, except Seaboard World Airlines. There are 26 foreign flag members and 3 U.S. flag members which are engaged in, and vote on, transatlantic air transportation. All IATA member carriers have an equal vote, and amendments to rates must be carried by a unanimous vote.

The rate structure consists of general commodity rates, specific commodity rates, and container or "bulk unitization" rates. The basic rates are the general commodity rates, but in the north Atlantic markets air freight moves largely under specific commodity rates

and, increasingly, under the discounted container rates. Specific commodity rates normally represent a discount from the general commodity rates for the purpose of attracting business from surface transportation. Between 65 per cent and 85 per cent by weight (depending on the carrier) of all transatlantic air freight moves under the specific rates (Appendix B, page 95a).

The Civil Aeronautics Board has no statutory authority to fix international rates in the first instance (as it does domestic rates), but does have authority to alter such rates to the extent necessary to correct a preference or prejudice which it may find to result from such rates. (49 U.S.C. § 1482(f), Appendix C, page 137a).

The specific issue before the Civil Aeronautics Board was whether the rate structure across the north Atlantic prefers New York and prejudices the other cities in violation of section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (Appendix C, page 136a.); and, if so, how the Board should remedy the situation under section 1002(f) of the Act, 49 U.S.C. § 1482(f) (Appendix C, page 137a). The Board found that the rate structure is unduly preferential to New York (Appendix B, page 116a.), and it ordered the air carrier parties to remove the preference by applying to the other named cities the

> "New York-European point rates per mile multiplied by the distance in miles between such cities and the point in Europe." (Appendix B, page 134a.)

Petitioner considers that the Board correctly found the rate structure invalid but that the mileage formula

prescribed, which is novel in ratemaking, fails to provide an adequate remedy and is capricious. The remedy primarily urged by petitioner before the Board, and before the Court of Appeals, is equalization of the rates as between Baltimore/Washington[2] and Philadelphia, on the one hand, and New York, with which these cities compete, on the other hand. This was the remedy recommended, after full hearings, by Administrative Law Judge William F. Cusick in his Initial Decision (Appendix B, page 71a). The administrative law judge was overruled in this crucial respect by the Board. Petitioner sought unsuccessfully in the court below, and seeks here, to reinstate the remedy adopted by Judge Cusick.

The Board's mileage formula continues to prefer New York in various ways in addition to the lower amount of the New York rate. Because rates between New York and various European points are characterized by extensive common-rating over great mileage differences within Europe, New York shippers would still generally receive more transportation miles for the same or less cost than shippers from Baltimore/Washington. Further, the Board would impose its "strict mileage" formula on a rate structure consisting largely of specific commodity rates, which are not established on the basis of mileage and are not susceptible to such a basis.[3]

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[2] Baltimore and Washington are treated jointly for purposes of this case since they are already common-rated.

[3] Thus, distance is not even included as one of the ten criteria for establishment of specific commodity rates in the applicable resolution of IATA. Indeed, the Civil Aeronautics Board itself has previously come to the same conclusion in a case which it has not even attempted to distinguish here. *Theodor Manufacturing Corp.*, C.A.B. Order No. E-22710, Docket 16343, see below at page 6.

The anomalies still inhering in the transatlantic rate structure are not found in the domestic freight rate structure. The domestic tariffs are constructed upon a system of common-rating by zones, in the form of concentric circles radiating from each point of origin. Typically, the first zone is a band three or four hundred miles wide, and within that zone all rates to and from a given point are the same. Beyond the first zone the circles are typically reduced to 50 miles in width. It is a system of this general nature which petitioner urged upon the Board in this case, with the zones to be determined, as they are in transatlantic surface transportation, on the basis of competition between United States gateways.

Not only does the domestic freight rate structure basically reflect a system of common-rating, but such a system applies widely in the international sphere as well, particularly with respect to the specific commodity rates. Thus, common-rating has long applied among the north Atlantic ports, on the one hand, and the Far East, many South American points, Hawaii (including intra-Hawaii) and Puerto Rico. It applies to mail as well as freight among the competing ports of the United States west coast and the Far East despite mileage differentials up to 685 miles (i.e., the difference between Tokyo-Seattle and Tokyo-Los Angeles) (Appendix B, page 68a). Competing points in Europe now enjoy equal rates despite mileage differentials of over 1,000 miles (Appendix B, page 59a).

The Civil Aeronautics Board itself has expressly recognized in the past that "rates are generally es-

tablished by areas." In *Theodor Manufacturing Corp., supra,* the Board said

> "The second phenomenon of rate construction illustrated by the two markets discussed above is that *rates are generally established by areas.* In other words, many points in a particular geographic area are frequently assigned the same rate level despite mileage differences. * * * Such common rating has been a customary practice in both surface and air transportation over the years, and demonstrates the fact that distance is only one of many factors considered in the determination of the lawfulness of rates." (Order No. E-22710, pp. 2-3). (Emphasis supplied).

We think it clear that the Board should have followed its own reasoning here, as did its administrative law judge [4]

The reason for IATA's refusal to extend the principle of common-rating to the northeastern gateways here involved is, as found by the Board, that

> "the maintenance of the existing disparities is largely attributable to the desire of the carriers (principally foreign) who do not provide service to the other gateways to lessen the impact of dilution on their revenues from freight originating at or destined for gateways other than New York * * *. The carriers benefitting from this structure have been able to frustrate attempts to improve the rate structure by exercising veto power through the IATA unanimity rule." Appendix B, pages 99a-100a.

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[4] As Judge Friendly of the U.S. Court of Appeals for the Second Circuit has pointed out, one of the prevailing difficulties of the Civil Aeronautics Board throughout its history has been its failure to adopt and follow consistent standards of decision. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1972-97 (1962).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH HISTORIC CONGRESSIONAL POLICY, BOTH OF WHICH HAVE SOUGHT FOR OVER A CENTURY TO INSURE EQUALITY OF OPPORTUNITY BETWEEN COMPETING PORTS.

A. The Board Correctly Found Discrimination Between Ports of a Kind Which Has Historically Been Forbidden in All Transportation Media.

The Board has adopted Administrative Law Judge Cusick's findings that

> "the North Atlantic cargo rate structure maintained pursuant to agreement by the IATA carriers prefers New York and prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago; that each of the prejudiced cities is competitive with New York for the movement of transatlantic cargo, and that shippers in these cities are also in competition with shippers in the New York area; that the existing preference and prejudice is undue; and that the rate structure has resulted in economic injury to the complaining gateways, and to shippers utilizing the North Atlantic services available at those gateways." (Appendix B, pages 93a-94a).

These findings on their face require equality of access to the European markets as between the shippers and receivers of cargo in the respective areas indicated. The Board, however, overruling the experienced administrative law judge who presided throughout the lengthy proceedings,[5] has refused to require such

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[5] It is interesting to note the remarks of Chairman Robert D. Timm of the Board before a Boeing Company cargo marketing meeting at Seattle, Washington, on July 24th, 1974:

> "In my personal discussions with the aviation cargo crew—executives of all cargo airlines, and executives of the combination carriers—I find a common theme when the CAB is

equality on the ground that "charging the same rate for a longer distance [6] as for a shorter one is unsound and not justified under the Act" (Appendix B, page 106a); and because the carriers threaten to increase the entire level of rates to compensate for such allegedly uneconomic mileage.

We submit that the administrative law judge was clearly right. One of the fundamental principles of rate-making, applicable to all forms of transportation, is equality of opportunity between directly competing localities. This principle overrides other considerations, including much more significant differences in distance than are involved here. For example, the Interstate Commerce Commission normally commonrates competing points where the mileage difference is less than 25 percent, see *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709, 725 (1962).

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discussed. They make the point that air cargo matters do not seem to take on the dimension of significance that passenger items do—they make the point that a special attitude on rates, differing from established stances relative to passenger carriage, seems to prevail—they make the point that the Board's attention span on cargo matters seems somewhat limited—they make the point that we do not seem to have developed a specialized bloc of cargo expertise, because of our preoccupation with the human cargo. * * * I am not satisfied, either, with my knowledge on this subject or the depth of the Board's commitment to cargo matters."

[6] The average difference in mileage between the Baltimore and Washington International Airports and Kennedy International Airport at New York is about 190 miles or about five percent of the transatlantic distance from Kennedy to London (Appendix B, pages 7a, 9a).

Section 404(b) of the Federal Aviation Act requires that

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Appendix C, pages 136a-137a).

This case represents the first construction of this subsection by the Board or the courts in its application to international rates. This subsection was fashioned after sections 3(1) and 216(d) of the Interstate Commerce Act[7] (49 U.S.C., sections 3(1), 316(d) (Appendix C, pages 137a-138a)). Section 3(1) of the Interstate Commerce Act did not originally include "ports" along with "localities" with respect to discrimination, and in 1933 this Court held that "ports" were not "localities" within the intent of the section, *Texas & P.R. Co.* v. *United States,* 289 U.S. 627, 638 (1933); but in 1935 (49 Stat. 607) Congress added the words "port, port district, gateway, transit point" to section 3 (1). The report of the House Committee on Interstate and Foreign Commerce (H. Rep. 1512, 74th Cong., 1st Sess. (1935)), is instructive with respect to the problem here:

> "In recommending that this bill be passed, the committee does so with the idea in mind that by amending section 3 of the Interstate Commerce Act as thus contemplated it will encourage and

[7] See also the comparable provisions in the Shipping Act, 46 U.S.C., sec. 816, Appendix page 139a.

promote the freedom of movement of export, import, and coastwise commerce through the ports of the country. *The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will permit, and that no restrictions upon and impediments to the free moving thereof should be imposed that are not clearly shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports, and to deprive other ports of an opportunity to handle a part of such traffic.* The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne." (Emphasis supplied). (p.2).

It would appear that the 1935 amendment was required by the Constitution of the United States, which provides in Article 1, section 9, clause 6:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

This is a "limitation upon the power of Congress to regulate commerce for the purpose of producing *entire commercial equality within* the United States * * *." *Passenger Cases* (1849) 7 How. 283, 414 (Emphasis supplied).

One hundred years after the *Passenger Cases* a unanimous court approved, in *Ayrshire Collieries Corp.* v.

United States, 335 U.S. 573 (1949), rate-making action by the Interstate Commerce Commission described as follows:

> "But the Commission made plain that in considering the whole problem of rate relations presented by this case it did not rely strictly upon distance. Distance was a factor but it was not controlling. *The Commission deemed its task to be the creation of a rate structure that would afford a fair opportunity to compete* in the purchase, sale and transportation of the coal from the various mines to the destinations in question. (Emphasis supplied). [335 U.S. at 588.] * * * Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well." 335 U.S. at 592.

In *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658 (1930), the Court said

> "The prohibition in § 3 (1) of the Interstate Commerce Act of any undue preference of one locality over another always has been treated as intended to prevent the use of rates as a means of promoting the artificial development of one locality to the detriment of another." (p. 667).

This is exactly what the foreign carriers in IATA have accomplished here. The rate preference which they have insisted upon for New York has been, and remains, a principal factor in promoting the development of traffic (to the point of serious congestion, Appendix B, pages 101a-102a.) at Kennedy Airport, to the economic detriment of Baltimore-Washington International Airport and the shippers and receivers of air freight in Maryland and its environs.

B. The Decision Below Nullifies the Anti-discrimination Statute by Prescribing Novel Strict Mileage Rates Instead of the Historic Remedy of Equalization of Rates at Competing Ports.

The long history of transatlantic ocean rates, and the complementary rail export-import rates, finally came to rest upon the principle of equalization as between directly competing ports, including Boston, New York, Philadelphia and Baltimore, see *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830, affirmed by an equally divided Court, 373 U.S. 372 (1963), reh. den. 374 U.S. 859. For many years ocean rates between Europe and Philadelphia/Baltimore had been higher than the rates to New York and New England, and in compensation Philadelphia and Baltimore had enjoyed rail export-import rates from "Differential Territory" lower than those charged the northern ports. After the ocean rates were equalized the railroads serving the northern ports equalized the rail rates, despite the fact that the southern ports, particularly Baltimore, are located closer to Differential Territory. The Interstate Commerce Commission refused to approve the newly reduced rates on the ground that the location of Baltimore and the other southern ports entitled them to a differential rate, see *Equalization of Rates at North Atlantic Ports,* 311 I.C.C. 689 (1959). The Commission's decision was reversed by the U.S. District Court for Massachusetts which held, in effect, that the railroads were merely applying the settled principle of equality of opportunity between competing ports. The Court held further that Baltimore's proximity to Differential Territory did not support the Commission's decision, which

> "if pressed to its logical conclusion, would result in traffic flowing only through the most distance

favored port", *Boston and Maine Railroad* v. *United States, supra,* 202 F. Supp. at 837.

Actually the Commission's action culminating in the *Boston and Maine* case represented an aberration for the I.C.C., which had for many years recognized that one of its principal functions was the enforcement of equal opportunity among competing ports. Thus, the Commission has recently summarized its policy in this regard as follows:

> "The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public. Generally, such equalization has not been approved in areas close to the respective ports." *City of Wilmington* v. *Alabama G. S. R. Co., supra,* at 725.

It is clear that if the I.C.C. had been presented with the facts of the instant case, the Commission would have equalized the rates.

As the Associate General Counsel of the Commission has recently written:

> "The crux of this problem lies in the fact that the provisions of the Interstate Commerce Act that protect shippers and localities from the [sic] discrimination are not cost-oriented. When, for example, Congress amended the statute in 1935 to protect ports, it did not thereby seek to further the most efficient development of economic resources, except insofar as it might be consistent with its purpose to 'encourage and promote the freedom

> of movement . . . through the ports of the country,' so that commerce could 'move freely through as many available ports as the governing circumstances will reasonably permit.' For this reason, *the Commission has given controlling weight to considerations other than distance, which presumably measures certain costs, in requiring the railroads to equalize their rates between competing ports.*" Goodman, *Recent Trends in Transport Rate Regulation,* 70 Mich. Law Rev. 1223, 1245 (June, 1972). (Emphasis supplied).

The court below has followed the Board in declining to follow the Interstate Commerce Commission (and Maritime Commission) precedents on the grounds that the surface rate structure reflects somewhat different costs ratios, i.e., as between fixed and variable costs, from the airline industry (Appendix A, page 8a). This point is made by the Board in its opinion (Appendix B, page 109a) in the absence of any record evidence on the point, but we submit that in any event such differences as undoubtedly exist could not destroy the substantial relevance of the surface precedents (particularly with respect to ports as close together as New York, Philadelphia and Baltimore/Washington).

Another point on which the Board (Appendix B, page 106a-107a) and the court (Appendix A, pages 9a-10a) rely is, we submit, equally unpersuasive. This is the fear that as the rates are equalized between New York, Philadelphia and Baltimore/Washington, this may in turn necessitate further equalization with other cities. As to this, petitioner would simply say "so be it" if the showing of direct competition which has been made here were to be made for such other cities. This fear recalls Justice Holmes' aversion to the argu-

ment that we do not dare to correct the particular injustice which is in front of us because if we do it may be necessary to go one step further and then another, and so on.

Petitioner submits that the court below has, without independent analysis, simply adopted an aberrant administrative action which conflicts with an historic Congressional policy recognized in decisions of this Court.

II. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The decision below will raise significant and recurring problems of international and interstate ratemaking, both air and surface. The revolutionary impact of the Board's decision has already manifested itself in respect to the west coast international airports, as shown below. The decision has ultimate implications for the domestic air freight rate structure, which is also substantially based on common-rating. Further, the effects of the decision will not be confined to air transportation, and may well bring into question the present equalization of ocean, and rail export-import, rates.

The Civil Aeronautics Board has already been forced to reverse its decision in this matter to the extent of equalizing the rates as between Detroit and Windsor, Canada, by reason of the "intense competition between transatlantic carriers operating out of these two cities", C.A.B. Order 74-7-130, Docket 20522, dated July 29, 1974. While this action is stated to be an "interim departure from the rate-per-mile concept", (p. 3), never-

theless it clearly brings back into focus the reality that direct competition requires equal—and not almost equal—rates.

As a result of the Board's decision here in question, the Port of Seattle (and associated parties) filed with the Civil Aeronautics Board on October 12, 1973 a "Petition for Order Amending Service Mail Rates". In this petition Seattle seeks to overturn the long-standing equalization of transpacific air mail rates as between Seattle and San Francisco, see above at page 6. The basis for this petition is stated to be the Board's decision here. While Seattle's petition relates only to mail rates, it may be confidently anticipated that the air freight rates as between these points (and Los Angeles and San Diego as well) will soon be questioned on the same ground. Nor is there any reason to doubt that this process of reexamination will stop on the west coast. On the contrary, there is every reason to expect that cities throughout the country which have a "geographic advantage" over a competing city, now common-rated, will seek to realize such advantage.

Thus the decision below, "if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port", *Boston and Maine Railroad* v. *United States, supra,* 202 F. Supp., at 837. Such a result would reverse a long-standing national policy approved by this court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

[Decision of the U.S.C.A. for the 4th Circuit dated June 6, 1974]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2070

THE COMMONWEALTH OF VIRGINIA, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

No. 73-2076

Department of Transportation of the State of Maryland (successor in interest to the Mayor and City Council of Baltimore, Maryland, originally named as a Complainant before the Civil Aeronautics Board), The Chamber of Commerce of Metropolitan Baltimore, Baltimore Customhouse Brokers and Forwarders Association, Air Freight International, Inc., and John S. Connor, Inc., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondents.*

On Petition for Review of an Order of the Civil Aeronautics Board.

Argued March 7, 1974 Decided June 6, 1974

Before WINTER, BUTZNER and FIELD, Circuit Judges.

Paul Reiber (Andrew P. Miller, Attorney General of Virginia, Vann H. Lefcoe and Henry M. Massie, Jr., Assistant Attorneys General of Virginia on brief) for petitioner in No. 73-2070; Frederick A. Ballard (Francis B. Burch, Attorney General of Maryland, J. Michael McWil-

liams and William M. Huddles, Assistant Attorneys General of Maryland, J. Cookman Boyd, Jr., John C. Smuck and Ballard and Beasley on brief) for petitioners in No. 73-2076; Alan R. Demby, Attorney, Civil Aeronautics Board, (O.D. Ozment, Deputy General Counsel, Glen M. Bendixsen, Associate General Counsel, Litigation and Research, Robert L. Toomey, Attorney, Civil Aeronautics Board, Thomas E. Kauper, Assistant Attorney General, Carl D. Lawson, Attorney, United States Department of Justice, Richard Littell, General Counsel, Civil Aeronautics Board, on brief) for respondents in Nos. 73-2070 and 73-2076; Nicholas Panarella, Jr., Assistant City Solicitor, (Herbert Smolen, Assistant City Solicitor, John Mattioni, Deputy City Solicitor, Martin Weinbert, City Solicitor for the City of Philadelphia, on brief) for intervenor City of Philadelphia, in Nos. 73-2070 and 73-2076; Herman F. Scheurer, Jr., (John J. McLaughlin and Shanley and Fisher on brief) for intervenor Metropolitan Washington Board of Trade in Nos. 73-2070 and 73-2076; Patrick W. Lee (Jerry W. Ryan, James M. Burger, Reavis, Pogue, Neal and Rose, on brief) for joint intervenors Pan American World Airways, Inc. and Trans World Airlines, Inc. in Nos. 73-2070 and 73-2076; Harold E. Spencer (Thomas F. McFarland, Jr., Michael M. Glusak, Richard L. Curry, Robert L. Hankin, John P. Cushman, James J. Tedesco, Jr., Belnap, McCarthy, Spencer, Sweeney and Harkaway, on brief) for intervenors Chicago and Detroit Interests in Nos. 73-2070 and 73-2076; (Laidler B. Mackall, Richard P. Taylor, John W. Arata and Steptoe and Johnson, on brief) for intervenors Massachusetts Port Authority and Greater Boston Chamber of Commerce in Nos. 73-2070 and 73-2076; (Francis A. Mulhern, Deputy General Counsel, on brief) for intervenors The Port Authority of New York and New Jersey in Nos. 73-2070 and 73-2076.

WINTER, Circuit Judge:

Virginia's and Maryland's petitions to review an order of the Civil Aeronautics Board (Board), a proceeding in

which two carriers—Pan American World Airways, Inc., and Trans World Airways, Inc.—and numerous affected localities—Philadelphia, Washington, Chicago, Detroit, Boston, Metropolitan New York-New Jersey—have been permitted to intervene, raises the basic question of whether the Board exceeded its statutory powers or acted arbitrarily or unreasonably in prescribing the formula for fixing new transatlantic cargo rates after it concluded that the then existing rate unduly preferred New York and prejudiced Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit and Chicago. Specifically, the Board found that cargo rates to United States gateway cities other than New York, constructed by adding the domestic rate from the gateway city to New York to the New York-European rate, irrespective of whether the shipment was in fact flown through New York, was unduly preferential to New York and unduly prejudicial to the other gateway cities.[1] None of the parties contests the correctness or lawfulness of this conclusion.

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[1] European air cargo rates consist of general commodity rates, specific commodity rates, and container or "bulk utilization" rates. The majority of cargo moves under specific commodity rates and an increasing amount under container rates.

The proceeding was begun in 1968 at the instance of the City of Baltimore. At that time, all rates to gateway cities other than New York were computed as stated in the text. In 1969, however, general commodity rates to all cities and specific commodity rates to Philadelphia and Baltimore-Washington were altered to require the addition of flat add-ons (known as "arbitraries") in lieu of the domestic rate to the New York-European rate. These arbitraries were somewhat lower than the domestic rate from New York to the other gateway city, but they still produced an overall rate significantly higher than an amount related to the mileage differential between a European point and New York as compared to the mileage between a European point and another United States gateway point. For example, although the Baltimore-Paris mileage is only 4.9% greater than the New York-Paris mileage, the specific commodity rate for data processing systems from Baltimore-Paris ranged from 7.5-12% above the New York-Paris rate.

Having concluded that the then existing rates were unlawful, the Board directed the establishment of rates computed by multiplying the mileage, by the shortest point-to-point route from European points to the various United States gateway points, by the New York-European rate per mile. It rejected the recommendation of the Administrative Law Judge that the best way to remedy the prejudicial rate structure was to prescribe a common rate, for the gateways of Boston, New York, Philadelphia, Baltimore and Washington.[2] In these petitions for review, Baltimore and Washington, joined by Philadelphia,[3] contend that the Board erred in failing to prescribe a common rate for the Northeast Corridor cities with New York.

From our review of the record, we conclude that the Board did not exceed its statutory authority or act arbitrarily or unreasonably in prescribing the mileage rate. We affirm the Board's order.

I.

While the Board has authority to prescribe rates, fares and practices in domestic air transportation, 49 U.S.C. § 1482(d), its authority over rates and fares for international air transportation is more limited. This is so be-

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[2] The Board did prescribe a common rate for Baltimore and Washington in recognition of the fact that the Baltimore-Washington International Airport, located between the two cities, and Dulles Airport, located in Northern Virginia, serve both communities. This common rate is the average of the two rates for each class of cargo to each of the two cities.

[3] Philadelphia did not petition to review the Board's order; rather, it intervened in this proceeding and supports the position of Virginia and Maryland. As a consequence, the Board questions our jurisdiction to grant relief to Philadelphia even if relief should otherwise be indicated. In the view that we take of the proper disposition of the petition for review, we find it unnecessary to decide the jurisdictional question. In our discussion, we will speak only of Virginia and Maryland.

cause of Congressional recognition that the rate-making authority of one nation in international air transportation necessarily can be exercised only with the acquiescence of another nation to which traffic is destined or from which it originates.[4] Thus, except for the recently granted limited power to suspend or reject unjust or unreasonable rates and fares in international transportation but not to prescribe just and reasonable new rates of fares,[5] the rate-making authority of the Board in a case like the instant one is limited to a determination of whether a rate, fare or charge "is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial," and if so, "[t]o alter the same to the extent necessary to correct such discrimination, preference, or prejudice . . . ." 49 U.S.C. § 1482(f)

Both Virginia and Maryland advance two overall contentions why the Board's order should be set aside: first, that as a matter of law the Board was required to prescribe a common rate for all United States gateway cities, and, second, that the mileage rate prescribed by the Board continues the previously existing undue preference to New York and undue discrimination against the other cities, especially Washington and Baltimore. These overall contentions involve a number of subsidiary arguments which we will treat *seriatim*. Additional facts will be stated where they are pertinent.

II.

The argument that, as a matter of law, the Board was required to prescribe a common rate is in part factual and

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[4] As a concomitant to the need for international cooperation in rate-making, international air fares and rates are generally established through the traffic conference machinery of the International Air Transport Association (IATA). For a description of the process, see National Air Carrier Ass'n v. C.A.B., 430 F.2d 185, 186 (D.C. Cir. 1970).

[5] P.L. 92-259, March 22, 1972; 49 U.S.C. §§ 1374(a), 1461 and 1482(j).

in part legal. Both the Administrative Law Judge and the Board found that New York handles eighty percent of the nation's international air cargo; that, as a result of this volume, New York experiences the highest rate of pilferage from shipments of any other terminal in the United States; that congestion and delays result from the proliferation of traffic through New York; that non-transport expenses are greater at New York; and that shippers in places other than New York are encouraged by New York's then existing preferential rate to employ surface transportation (trucks) to and from New York rather than through air transportation to points of origin and destination in the gateway city nearest to the shipper. It is argued that since there is a strong national interest in avoiding a monopoly of imports and exports in a single port, the way to achieve equality of opportunity—indeed, the *only* way as prescribed by Congress—is to prescribe a common rate, notwithstanding that New York is 190 miles closer to European cities than Baltimore-Washington. Heavy reliance is placed upon the provisions of the Interstate Commerce Act, 24 Stat. 379, and I.C.C. and court decisions interpreting it to permit or require common-rating in certain instances, because it is asserted that such Act served as a model for the anti-discrimination provisions of the Federal Aviation Act of 1958, and therefore the latter should receive a like interpretation.

We think that there are several reasons to reject this argument. First, there can be little doubt that, in fashioning a remedy where undue preference and undue discrimination have been found to exist, an administrative agency possesses a large measure of discretion in choosing measures to remedy the discrimination. Its exercise of this discretion will not be disturbed absent a showing that its order lacks evidentiary support, transgresses some constitutional limit, or otherwise amounts to an abuse of power. Board of Trade v. United States, 314, U.S. 534, 546 (1942); Ayrshire Collieries Corp. v. United States 35, 573, 593 (1948).

Factually, the premise of the Board's order that "the most equitable and practical rate structure is one based on mileage" has substantial evidentiary support. The record shows that major costs for air transportation tend to vary with miles flown. It is, of course, true that the anti-discrimination provisions of the Federal Aviation Act are closely modeled on their counterparts in the Interstate Commerce Act, but that is not to say that the decisional precedents of one statute can be indiscriminately imputed to another. Substantial differences in the operations of rail and air transportation may well warrant a different regulatory approach to ech industry. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 108 (1948); Las Vegas Hacienda, Inc. v. C.A.B., 298 F.2d 430 (9 Cir. 1962). Unit costs of railroad operations do not tend to increase with distance nearly as much as in air carrier operations. Thus, decisions approving or imposing common-rating on rail carriers would not depart from the cost of service approach of rate-making to the same extent as would common-rating for air transportation. It follows, we think, that the C.A.B. is not bound by the common-rating decisions applicable to railroads, and the C.A.B. has broader discretion than the I.C.C. to require that differences in distances be reflected in differences in rates.

More importantly, the anti-discrimination provisions of neither Act were intended to deprive a locality of the natural advantages of its geographic location. United States v. Illinois Central Ry., 263 U.S. 515, 524 (1924); Alabama G.S.R. Co. v. United States, 340 U.S. 216 (1951).[6] New York is closer to European cities than Baltimore and

[6] Even under the Interstate Commerce Act, the I.C.C. has given full recognition to distance as a significant factor supporting rate disparities. For some examples, see Board of Trade v. Ill. Cent. R. Co., 344 I.C.C. 818 (1973); Canaveral Port Authority v. Ahnapee & W. Ry. Co., 337 I.C.C. 681 (1970); Maritime Association, Boston Chamber of Commerce v. A.A. R.R. Co., 95 I.C.C. 539 (1925).

Washington, by an average distance of 190 miles, and this fact alone should support a higher overall rate differential for the latter.

The instances in which the Board has approved common rates do not persuade us that the Board acted arbitrarily or capriciously in rejecting them here. Nearly all domestic rates and fares reflect distance and among domestic points common-rating is rare. The majority of rates for international transportation is not common-rated. The Board has, nevertheless, given approval to some international common-rating,[7] but it has apparently done so because of "special circumstances" not present here, or because of the need for cooperation and agreement among nations engaged in air transportation. See IATA Transatlantic Cargo Rates, Opinion on Remand, Order 73-10-55, October 15, 1973. At the same time, the Board has consistently emphasized that international air fares should be priced according to costs and related to distances. Statement of C.A.B. on North Atlantic and Mid-Atlantic Fare Matters to be Negotiated at the IATA Traffic Conference in Montreux, July, 1972; IATA Transatlantic Fares Agreement, Order 72-3-104, March 30, 1972; IATA Transatlantic Fare Agreement, Order 73-4-64, April 13, 1973; Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

Finally, the reasonableness of the Board's exercise of its discretion to require mileage rates can also be demonstrated by the discriminatory effect that the common-rating advocated by Baltimore and Washington would have and the economic impact of common-rating on affected carriers. It should be remembered that the Board's rate-making powers in the instant case are exercisable only in the limited context of removing undue preferences and undue discrimination.

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[7] Hawaiian Common Fares Case, 37 C.A.B. 269 (1962); Northwest-Alaska Tariff Investigation, 17 C.A.B. 903 (1953); West Coast Common Fares Case, 15 C.A.B. 90 (1952).

The Board would hardly carry out its statutory duty if it created new and different undue preferences or undue discrimination. And yet common-rating Baltimore, Washington, Philadelphia, and Boston with New York would create preferences and discrimination that could properly be deemed "undue." Under such a scheme, Boston, which is nearer to most European cities than New York, and New York, which is nearer than Philadelphia, Baltimore or Washington, would both lose the economic advantage of their geographic locations. They would be discriminated against. Conversely, Philadelphia, Baltimore and Washington would be preferred. Cleveland, Chicago and Detroit would also be adversely affected. For example, air mileage from Cleveland to London is only 3.2% greater than that from Baltimore to London. Yet, if Baltimore were common-rated with New York, Cleveland's rates would be 12.3% greater than Baltimore's rates.

The level of rates, *per se*, was not an issue in the proceedings before the Board. Nonetheless, we think that the Board properly considered the economic impact of common-rating on the carriers affected. In this regard, the Board found that common-rating would result in a two-fold reduction in revenues, viz. revenues on freight originating at or destined for gateways other than New York, and revenues to the trans-Atlantic carrier for goods originating at or destined for gateways other than New York which are routed over domestic carriers via New York for which pro-rating of revenues with the domestic carrier is required. Inferentially, common-rating could bring about higher rates—a result which the Board ought not to encourage if it has a choice in the matter.

For all of these reasons, we conclude that the Board was not required as a matter of law to prescribe common rates, and its exercise of its discretion not to prescribe common rates should not be disturbed.

III.

We turn to the contention that the mileage rate prescribed by the Board continues the previously existing undue preference to New York and undue discrimination against the other cities, especially Baltimore and Washington.

In support of this conclusion, Maryland argues that the Board's mileage formula is intrinsically invalid and discriminatory because only about 55% of the North Atlantic air freight rate is accounted for by costs which vary by mileage. It is argued, therefore, that it is preferential to New York and prejudicial to Baltimore to require Baltimore shippers and importers to pay a differential based on application of the mileage difference to 100% of the rate. We are not persuaded. First, there is evidence in the record that the relationship between costs and mileage may be higher than 55%. The reason for this is that there is a point in projecting a long-range direct flight that the carrier must sacrifice payload weight for fuel to complete the voyage. Additionally, as found by the Board, some indirect costs also increase with mileage. For example, servicing costs are generally treated as indirect costs, and servicing is more frequent when equipment is flown greater distances. More importantly, the object of the instant proceedings was to determine the *relationship* among rates to the various cities involved and *not* the precise level of those rates. We do not believe that the Board, having provided a formula which permits Baltimore to compete with New York commensurate with its geographic location without "undue" discrimination, was required to compute and impose a rate differential in terms of precise costs.

Virginia asserts that the Board's mileage-based formula is intrinsically invalid and discriminatory because the per-rate mile between a given United States gateway city and a given European city is not always the same as the rate between that United States gateway city and another

European city. To illustrate, Virginia points out that New York shippers get 4,004 miles of air transportation to Milan, Italy, for 78 cents per pound; but for 3,646 miles of air transportation to London—almost 400 miles less—Dulles airport shippers must pay 79 cents per pound. This example, Virginia contends, demonstrates that the New York shipper is unduly preferred and the Dulles shipper is unduly discriminated against.

The short answer to the argument, however, is that Virginia seeks to compare apples with oranges. There is common-rating of points in Europe, usually at the instance of European governments, and this is a matter beyond the regulation or control of the Board. But the fact is that to any *particular* European city the mileage rate from New York or any other United States gateway city is precisely the same, and hence, there is neither preference to New York nor discrimination against the other United States gateway cities. For example, if, as a result of common-rating in Europe, the mileage rate from New York to a given city in Europe is two cents more or less than the rate from New York to London, it is the same two cents more or less than the rate from any other United States city to London.

Virginia also argues that New York is preferred because specific through rates are published from New York, while the rates to the other gateways are computed pursuant to a conversion table reflecting the mileage differential over New York applicable to each of the other gateways. We do not deem this a preference. The computation to find the rate to another gateway city is merely the multiplication of the percentage mileage differential over New York by the New York rate. We do not think that the task is so difficult that it would affect a shipper's selection of gateways.

Finally, Maryland argues that the common-rating for Baltimore and Washington should be the mileage to Balti-

more, and not the average of the mileages to Baltimore and Washington, in order to prevent creation of a new discrimination against Baltimore area shippers. We do not agree. The Board found that because of the close geographical proximity of the two cities and the virtual overlap of the service areas of their respective international airports, a common rate was virtually essential and use of the mid-point mileages as a basis for the common rate represented a fair balancing of the interests of shippers in both cities. In this, we think the Board eminently correct; certainly it did not abuse its discretion.

For all of these reasons, the order of the Board is

AFFIRMED.

APPENDIX B

[Initial Decision of William F. Cusick, dated February 8, 1972]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AGREEMENTS ADOPTED BY IATA RELATING TO NORTH ATLANTIC CARGO RATES

DOCKET 20522

INITIAL DECISION OF WILLIAM F. CUSICK, HEARING EXAMINER

Served: February 8, 1972

UPON:

Frederick A. Ballard, 912 American Security Building, 730 – 15th Street, N.W., Washington, D.C. 20005, for Mayor and City Council of Baltimore, Md., the Chamber of Commerce of Metropolitan Baltimore, Baltimore Customhouse Brokers and Forwarders Association, Air Freight International, Inc., and John S. Connor, Inc.

Charles B. Myers, 611 LaSalle Bank Building, Chicago, Illinois 60603, for City of Chicago and the Chicago Association of Commerce and Industry.

This Initial Decision is rendered pursuant to the authority delegated to examiners under Rule 27 of the Rules of Practice in Economic Proceedings. It becomes effective as the final order of the Board 30 days after service thereof unless a petition for discretionary review is filed within 21 days after service thereof in accordance with Rule 28 or the Board issues an order within said 30-day period to review upon its own initiative. If a petition for discretionary review is timely filed or action to review is taken by the Board upon its own initiative, the effectiveness of this Initial Decision is stayed until further order of the Board.

John J. Fitzpatrick, 1800 Union Commerce Building, Cleveland, Ohio 44115, for City of Cleveland and Greater Cleveland Growth Association.

George C. Kiba, 150 Michigan Avenue, Detroit, Michigan 48226, for Detroit Aviation Commission and Board of County Road Commissioners of the County of Wayne, Mich., and Greater Detroit Chamber of Commerce.

Richard P. Taylor, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036, for the Massachusetts Port Authority.

Lawrence D. Wasko, 700 Woodward Building, Washington, D.C. 20005, for City of Memphis, Tenn., and Memphis Area Chamber of Commerce.

H. F. Scheurer, Jr., 1815 H Street, N.W., Washington, D.C. 20006, for Metropolitan Washington Board of Trade.

Herbert Smolen, 1530 Municipal Services Building, Philadelphia, Pa. 19107, for City of Philadelphia and the Greater Philadelphia Chamber of Commerce.

Francis A. Mulhern, 111 Eighth Avenue, New York, N.Y. 10011, for The Port of New York Authority.

Paul Reiber, 1625 Eye Street, N.W., Washington, D.C. 20006, for the Virginia Airports Authority and the Fairfax County Industrial Authority.

William A. Kutzke, Office of Litigation, Department of Transportation, Washington, D.C. 20590, for the Department of Transportation.

Albert F. Grisard, 613 – 15th Street, N.W., Washington, D.C. 20005, for Air Canada.

V. Michael Strauss, 1625 Eye Street, N.W., Suite 809, Washington, D.C. 20006, for Air France.

Joel Fisher, 1522 K Street, N.W., Washington, D.C. 20005, for Air India.

J. Lawrence Smith, 1660 L Street, N.W., Washington, D.C. 20036, for Airlift International, Inc.

Allan I. Mendelsohn, 1819 H Street, N.W., Washington, D.C. 20006, for Alitalia Airlines.

Edwin I. Colodny, Washington National Airport, Washington, D.C. 20001, for Allegheny Airlines, Inc.

Vance K. Morgan, 63 Third Avenue, New York, N.Y. 10017, for American Airlines, Inc.

Albert F. Grisard, 613 – 15th Street, N.W., Washington, D.C. 20005, for Austrian Airlines.

B. Howell Hill, 1229 – 19th Street, N.W., Washington, D.C. 20036, for Braniff Airways, Inc.

Cyril Hyde Condon, One Rockefeller Plaza, New York, N.Y. 10020, for British Overseas Airways Corporation.

G. Robert Simmons, 610 Fifth Avenue, New York, N.Y. 10020, for British West Indian Airways, Ltd.

Stephen M. Creskoff, 1001 Connecticut Avenue, N.W., Washington, D.C. 20036, for Delta Air Lines, Inc.

Jerry W. Ryan, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036, for Eastern Air Lines, Inc.

Ruth J. Weinstein, 122 East 42nd Street, New York, N.Y. 10017, for El Al Israel Airlines.

John L. Richardson, 1660 L Street, N.W., Washington, D.C. 20036, for Finnair.

J. W. Rosenthal, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, for The Flying Tiger Line, Inc.

Manuel Martin Tebar, 518 Fifth Avenue, New York, N.Y. 10036, for Iberia, Lineas Aereas de Espana, S.A.

Jerry W. Ryan, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036, for Irish International Airlines.

Laurence A. Short, 1054 – 31st Street, N.W., Washington, D.C. 20007, for Japan Air Lines Company, Ltd.

Linus H. Walker, 609 Fifth Avenue, New York, N.Y. 10017, for K.L.M. Royal Dutch Airlines.

G. Nathan Calkins, 1054 – 31st Street, N.W., Washington, D.C. 20007, for Lufthansa German Airlines.

Jerrold Scoutt, 888 – 17th Street, N.W., Washington, D.C. 20006, for Mohawk Airlines, Inc.

Edwin O. Bailey, P.O. Box 2055, A.M.F., Miami, Florida 33159, for National Airlines, Inc.

Clarence I. Peterson, 1625 Eye Street, N.W., Washington, D.C. 20006, for Northeast Airlines, Inc.

William R. Joyce, Jr., 1701 Pennsylvania Avenue, N.W., Washington, D.C. 20006, for Olympic Airways, S.A.

Paul L. Bradshaw, 705 Woodruff Building, Springfield, Missouri 65805, for Ozark Air Lines, Inc.

Richard J. Fahy, Jr., Pan Am Building, New York, N.Y. 10017, for Pan American World Airways, Inc.

William C. Burt, 1000 Vermont Avenue, N.W., Washington, D.C. 20005, for Piedmont Aviation, Inc.

G. Nathan Calkins, 1054 – 31st Street, N.W., Washington, D.C. 20007, for Quantas Airways, Ltd.

Ronald H. Cohen, 720 Fifth Avenue, New York, N.Y. 10019, for Sabena Belgian World Airlines.

Ruth J. Weinstein, 122 East 42nd Street, New York, N.Y. 10017, for Scandinavian Airlines System.

Stephen L. Gelband, 1522 K Street, N.W., Washington, D.C. 20005, for Seaboard World Airlines, Inc.

Cecil A. Beasley, 912 American Security Building, Washington, D.C. 20005, for Southern Airways, Inc.

G. Nathan Calkins, 1054 – 31st Street, N.W., Washington, D.C. 20007, for Swiss Air Transport Company Ltd.

Ulrich V. Hoffmann, 605 Third Avenue, New York, N.Y. 10016, for Trans World Airlines, Inc.

John L. Richardson, 1660 L Street, N.W., Washington, D.C. 20036, for Transportes Aereos Portugueses, S.A.R.L.

Charles F. McErlean, Jr., P.O. Box 66100, Chicago, Illinois 60666, for United Air Lines, Inc.

Charles P. Muldoon, 1000 Hill Building, Washington, D.C. 20006, for United Arab Airlines.

Jacob Goldberg, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428, for the Bureau of Economics.

FOUND:

1. That the IATA agreement adopted at the Athens Conference in 1969, embodying the North Atlantic cargo rate structure contained in Agreement CAB 21046, is unduly and unreasonably preferential to New York, and unduly prejudicial and unjustly discriminatory to Baltimore, Washington, Philadelphia, Boston, Detroit, Cleveland and Chicago.

2. That the system used in the construction of said rates involving the above cities is adverse to the public interest, in violation of the Act, and unlawful.

3. That reconsideration of approval of Agreement CAB 21046 is required so as to (a) commonrate the cities of Boston, Philadelphia, Baltimore and Washington with New York, and (b) eliminate add-ons between Detroit, Chicago and Cleveland, on the one hand, and New York on the other hand, and in place thereof adopt a per mile rate for each of the said cities and New York City.

4. That the minimum charge of $25 per kilogram at each of the above-named cities be reduced to the same minimum

charge effective at New York City, i.e., $22 per kilogram, by the elimination of the existing $3 add-on charge.

5. That North Atlantic air cargo carriers be placed on notice that full compliance with findings contained herein will be expected in all North Atlantic air cargo rates for the cities involved, whether such rates are established by a continuation of existing agreements or amendments or extensions to said agreements, or by new agreements, or by the filing of new rates by one or more individual air carriers.

6. That the investigation instituted pursuant to Order 69-3-47, dated March 13, 1969, be terminated.

APPEARANCES:

Frederick A. Ballard and *John C. Smuck* for the Baltimore Parties.

Richard P. Taylor, Wilson D. Rogers, Jr., and *James E. Mahoney* for the Boston Parties.

Charles B. Myers and *Gerald E. Franzen* for the Chicago Parties.

George C. Kiba and *James J. Tedesco* for the Detroit Parties.

Lawrence D. Wasko and *Theodore I. Seamon* for the Memphis Parties.

Herman F. Scheurer, Jr., for the Metropolitan Washington Board of Trade.

George Milanos, Francis A. Mulhern and *Sidney Goldstein* for the Port of New York Authority.

Paul Reiber and *Herbert A. Rosenthal* for the Virginia Parties.

Albert F. Grisard for Air Canada.

Vance K. Morgan for American Airlines, Inc.

Allen T. Brown for Eastern Air Lines, Inc., and Irish International Airlines.

John L. Richardson for Finnair and TAP Portuguese Airways.

Ronald P. Wertheim and *J. W. Rosenthal* for The Flying Tiger Line, Inc.

Linus H. Walker for KLM Royal Dutch Airlines.

G. Nathan Calkins and *Laurence A. Short* for Lufthansa German Airlines.

Edwin O. Bailey and *William A. Nelson* for National Airlines, Inc.

Robert N. Duggan and *Richard J. Fahy, Jr.*, for Pan American World Airways, Inc.

Ronald H. Cohen for Sabena Belgian World Airlines.

Stephen M. Creskoff for SAS Scandinavian Airlines System, Inc., and Delta Air Lines, Inc.

Joel H. Fisher, Stephen L. Gelband and *Richard A. Frank* for Seaboard World Airlines, Inc.

Ulrich V. Hoffmann for Trans World Airlines, Inc.

Martin F. McMahon, Jacob Goldberg and *George Cosson* for Civil Aeronautics Board, Bureau of Economics.

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Prefatory Statement

This proceeding came about as a result of a complaint filed by the City of Baltimore (Baltimore Parties), in concert with several additional parties concerned with the transatlantic movement and the rates and charges therefor of air cargo between Baltimore/Washington and points in Europe. The nub of the complaint strikes at the transaltantic cargo rate structure, as established by agreements of the International Air Transport Association (IATA), alleging in substance that the rates unduly discriminate against Baltimore/Washington, and are unduly preferential to New York/Boston. As an additional basis for the complaint, the Baltimore Parties also allege that the rate structure is adverse to the public interest.

Various pleadings were filed in answer to the complaint, with some documents supporting and others denying the allegations advanced by the Baltimore Parties. Among such filings were those of Pan American World Airways, Inc. (Pan American), and Trans World Airlines, Inc. (TWA), who submitted a joint answer conceding some merit to certain allegations in the complaint, but also indicating strong opposition to any modification of the rate structure which contemplated that Washington/Baltimore be commonrated with New York as suggested by the complainants. Other answers in opposition to the complaint were filed by various foreign carriers, including a joint answer by Japan Airlines Company, Ltd. (Japan), Lufthansa German Airlines (Lufthansa), Quantas Airways Limited (Quantas), and Swiss Air Transport Company Limited (Swissair); and a separate answer submitted by Royal Dutch Airlines (KLM). Sabena Belgian World Airlines (Sabena) sought a dismissal of the complaint.

In attacking the complaint, the documents submitted by the foreign air carriers direct attention, in general, to the fact that those carriers do not serve Baltimore; that the rate structure complained of may well be resolved at a future IATA Cargo Conference and, furthermore, that the

IATA agreements in question have heretofore been approved by the Board in accordance with various bilateral agreements. The same carriers also argue that any action by the Board which is restrictive of the agreements would also be inconsistent with the provisions of Section 1102 of the Federal Aviation Act of 1958, as amended, (the Act).

The Virginia Airports Authority and the Fairfax County Industrial Authority (Virginia Parties) submitted an answer supporting the complaints of the Baltimore Parties, and requested that there also be included within the scope of the case an issue relating to transatlantic cargo rates to and from Washington, D. C., as served via Dulles International Airport (Dulles). At the same time, the Metropolitan Washington Board of Trade (Washington), petitioned for leave to intervene.

Upon consideration of the foregoing, the Board concluded that an investigation of these matters was warranted.[1] It also determined that the same discrimination and prejudice issues existed with respect to transatlantic cargo rates for service to and from Washington, D. C., through Dulles, as with respect to the same service via Friendship International Airport (Friendship). The investigation was accordingly broadened to include rates applicable to service via Dulles. At the same time, Sabena's motion to dismiss the complaint was denied.[2]

In addition to the above the Board specifically directed that there be included as issues in the proceeding, matters relating to whether the IATA resolutions establishing the present rate structure are adverse to the public interest or in violation of the Act. Named as parties to the proceeding were all IATA air carriers and foreign air carriers who provide cargo service on the North Atlantic whether by direct single-carrier service, or by participation in through service pursuant to joint rate agreements. All

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[1] Order 69-3-47, dated March 13, 1969.

[2] Id.

U.S. carriers participating in such through service via domestic segments were also named parties.

Subsequently, the Board, in disposing of various petitions and motions directed that the investigation be expanded so as to extend the issue of preference and prejudice as related to the rate structure via the New York gateway, *vis-a-vis* Boston, Philadelphia, Cleveland, Detroit and Chicago.[3]

In due course a Prehearing Conference was held at which there were discussed various items of an evidentiary and informational nature which would be essential in resolving the issues. Where necessary the latter were clarified and in certain respects refined so as to precisely meet the directives in the Board's orders. These issues of both a primary and subsidiary nature are set out in more detail hereinafter.

Pursuant to the requirements of the Act and the Regulations, all interested parties received notification of the public hearing to be conducted in Washington, D. C. All parties having an interest in the matter were invited to present any relevant and material evidence having a bearing upon the issues involved. At the close of the hearing the parties were also invited to file briefs setting forth their respective positions and arguments based upon the evidentiary record as compiled at the hearing.[4]

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[3] Orders 69-4-139 and 69-10-111, dated April 30, 1969, and October 23, 1969, respectively.

[4] Briefs were filed by the following: Baltimore Parties; Massachusetts Port Authority and the Greater Boston Chamber of Commerce (Boston Parties); City of Chicago and the Chicago Association of Commerce and Industry (Chicago Parties); Detroit Aviation Commission and Board of County Road Commissioners of the County of Wayne, Michigan and Greater Detroit Chamber of Commerce (Detroit Parties); Washington; City of Philadelphia and Greater Philadelphia Chamber of Commerce (Philadelphia Parties); Port of New York Authority (Port Authority); Virginia Parties; Pan American; Seaboard World Airlines, Inc. (Seaboard); TWA; and the Bureau of Economics (the Bureau).

The Issues

The basic issues in the case are two in number. They are as follows:

(I) Whether the North Atlantic air cargo rates or charges, or the relationship of such rates or charges, whether joint or local rates or charges, and any revisions thereof, of the IATA carriers between European points served by them, on the one hand, and New York, on the other hand, *vis-a-vis* the air cargo rates and charges of such carriers, whether joint or local rates or charges between such European points, on the one hand, and Baltimore and/or Washington, D. C., and/or Philadelphia and/or Boston, and/or Detroit, and/or Chicago and/or Cleveland, (referred to hereinafter as "other U.S. cities"), on the other hand, causes any undue or unreasonable preference or advantage to any person, port, locality, or description of traffic, or subjects any person, port, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage, and if such rates or charges, or the relationship of such rates or charges is found to be unjustly discriminatory, unduly preferential, or unduly prejudicial, to determine how such rates or charges should be altered, or what order should be made to the air carriers and foreign carriers to remove such discrimination, preference, or prejudice; and

(II) Whether resolutions of IATA which establish or provide for the establishment of such rates and charges are adverse to the public interest or in violation of the Act.[5]

Sub-issues. In addition to the above primary issues, the proceeding also embraces certain matters of a subsidiary nature which are appropriate for consideration in arriving

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[5] The Board specifically excluded issues relating to the lawfulness of the general rate level of either the general commodity or specific commodity rates—except to the extent the level bears upon the discrimination issue—as well as the relationship of rates as among the different weight breaks between the same points.

at a final determination of the problems presented. Such sub-issues include the following:

(1) To what extent are the IATA carriers' costs for carriage of air cargo including all necessary and proper costs for take-off, landing, and ground handling, different between European points and New York and between European points and such other U.S. cities; and

(2) If such costs are different, are the cost differentials reasonably related to the rate differentials for carriage between Europe and New York as compared with carriage between Europe and such other U.S. cities; or

(3) What other factors exist which may justify rate differentials between New York and Europe and between such other U.S. cities and Europe;

(4) Should cargo rates between Europe and the other U.S. cities be reasonably related to mileage; and, if so, what is the appropriate ratemaking mileage for each such other U.S. city;

(5) Whether the effect of the existing IATA cargo rate structure has been to divert traffic through the New York or Boston gateways which would have otherwise moved directly by air from or through one or more of the other U.S. cities; and, if so, whether such diversion is in the public interest;

(6) Whether the public interest requires that one or more of said U.S. cities be commonrated with the New York gateway;

(7) If such commonrating is required by the public interest, what criteria should be used in selecting the cities which are to be so commonrated;

(8) Does IATA Resolution 590, or like resolution and the machinery established through, by, or under any such resolution, including the unanimity requirement thereof, preclude an IATA carrier from unilaterally establishing

specific commodity rates between Europe and said other U.S. cities other than New York; and, if so, does it operate to the detriment of the public interest; and

(9) Whether said IATA Resolution 590, or any like resolution and the machinery established through, by, or under any such resolution, including the unanimity requirement, is unduly restrictive of the freedom of individual carriers to promote traffic through such other U.S. cities by offering rates competitive with the rates through New York, and is thus adverse to the public interest; and

(10) If so, whether Board approval of IATA cargo resolutions should be conditioned so as to require elimination of restrictions against such unilateral action.

The Parties

As noted before, the Board named as parties to the case a large number of U.S. carriers, both domestic and those serving international points, as well as numerous foreign air carriers. However, at the hearing stage of the proceeding participation in the case was limited to those shown on the appearance sheet appearing in the forefront hereof, and active participation by several of those parties was extremely limited. Others, although named in the Board's orders as parties to the proceeding, apparently elected not to appear or to present any evidence indicative of whatever position they might choose to espouse.

The cities primarily affected by the outcome of the investigation—except for Cleveland—did actively engage in all phases of the case and their positions, as well as statements on brief submitted in support thereof, are shown in the following.

Baltimore. These parties urge that the IATA rate structure both with respect to general cargo and specific commodity rates, including so-called bulk unitization, or container rates, plus the minimum $25 charge on shipments

from Friendship, as compared with a minimum of only $22 from John F. Kennedy International Airport (JFK), results in a system that is both discriminatory and prejudicial.

In arguing that the existing rate structure is unlawful, Baltimore maintains that (a) it discriminates against persons, ports and localities in violation of Section 404(b) of the Act: (b) it retards the development of alternate gateways so as to relieve the concentration of transaltantic traffic at JFK; (c) it encourages the systematic use of truck service to New York in substitution of air service, and is therefore violative of both Sections 404(a) and 404(b) of the Act; (d) the immunity provided by Section 414 of the Act is forfeited, and the antitrust laws therefore are violated by reason of IATA's abuse of the privileges conferred thereby; and (e) no cost or other justification for the discrimination reflected by the rate structure is advanced by those parties opposing a change in the existing unlawful rate system. Baltimore urges that the only proper solution to the demonstrated inequities in the rates is through an equalization of such rates between U.S. cities in direct competition with each other. In this connection the city calls attention to the fact that Baltimore and Washington are commonrated by IATA, and all references to Baltimore are thus equally applicable to Washington.

Baltimore maintains that IATA's rate policies are detrimental to Baltimore and Washington insofar as shipments originate at or are destined directly to those points. Moreover, because of the applicable add-ons, it asserts that these policies have deprived the cities in question of much business to and from points south and west thereof—the so-called "hinterland" areas—which it alleges would normally use the Baltimore/Washington gateways were it not for the fact that shipments can move by truck to and from those points via the New York gateway at a more economic rate.

Finally, Baltimore calls attention to the fact that as recently as the Athens Conference held in April and May, 1969, IATA was on notice of the pendency of this proceeding to investigate discrimination and preferences under the IATA rate system, yet it nevertheless adopted the so-called "bulk unitization charges" as reflected in Resolution 534(a), with rates pegged solely to New York and averaging about 10 percent greater for Baltimore and Washington.

Virginia Parties. The interest of these parties is mainly with respect to the movement of cargo, both actual and potential, to and from points in Europe via Dulles. Much of the same arguments advanced in support of lower cargo rates for Dulles, recognized as the prime terminal for international cargo traffic to and from the Washington area are, of course, equally applicable to data introduced in support of lower rates for international cargo moving via Friendship, the principal terminal for Baltimore gateway traffic.

In support of their argument for an improved rate structure, the Virginia Parties call attention to the fact that the Board from the beginning noted the lack of justification for the disparate relationship of the rates to Baltimore/Washington, *vis-a-vis* New York, as compared with the mileage differential.[6] Attention is also directed to the fact the Board, in the same Order, also recognized that with respect to European cities beyond the gateway points, the IATA rate structure generally provides a lower differential than would normally be indicated by the mileages involved and, in many instances, the points are commonrated with the gateway cities. The Virginia Parties submit that on the basis of the record established herein, the above observations of the Board have been fully confirmed and justify the taking of remedial action at this time.

In this connection it refers to various data tending to support its position that shippers using Dulles are required

[6] Order 69-3-47, dated March 13, 1969, page 3.

to pay higher rates than shippers transporting merchandise between New York and the same European points without any variance in distance. The discrimination is present with respect to general commodity and to specific commodity rates as well, where the preferential nature of the rates applicable to New York is immediately apparent. As an illustration of the disadvantage to Dulles, the Virginia Parties point to the fact that there are some 40 European cities commonrated to U.S. points, while Boston is the only commonrated point with New York.

While the Virginia Parties concede that a difference in rates charged for the same service is not, by that fact alone, barred by Sections 404(b) and 1002(f) of the Act, they argue that there must be a showing that the difference in rates is justified by the cost of the service, the value of the shipments being transported, or by other transportation requirements. In this respect, the Virginia Parties maintain that the carriers made little or no effort to justify the rate differentials for the probable reason that the differentials are not justified by differences in costs. In fact, the Virginia Parties point out that a Pan American witness readily conceded that he knew of no basis for justifying the variations in the relationship of the Baltimore rates to the New York rates with respect to shipments moving between those gateways and points in Europe.

In further support of their position, the Virginia Parties offered the testimony of a number of witnesses designed to show that the existing rate structure has prejudiced the development of Dulles by being unduly preferential to New York. Similar to the point made by the Baltimore Parties, the Virginia Parties submit that the transatlantic rate between Dulles and Europe, compared to the New York-Europe rate, is higher because of the rate differential which makes it more economic to truck merchandise directly to New York and then transship under the lower New York-Europe rate.

Witnesses who testified in support of the above represent a wide range of businesses, including the DuPont Company which estimated the potential annual traffic—on the basis of 1970 data—for shipments via Dulles from various plants it operates in the southeastern section of the country, at over one billion pounds. Another witness with long experience as an officer of a freight transportation company offered testimony in a similar vein, while the Director of the Division of Industrial Development for Virginia asserted that the existing rate structure in the Virginia area has handicapped the international trade and developmental efforts of the area, with the Nation's balance of trade and balance of payments also negatively affected thereby.

Aside from its position that the present rate system is discriminatory and preferential under Sections 404(b) and 1002(f) of the Act, the Virginia Parties maintain that it should also be disapproved on the basis of public interest factors. In this connection it argues that the public interest lies in maintaining competitive opportunities for American manufacturers, and under the existing rate structure inland exporters and importers are hard put to compete on an equal basis with foreign shippers and foreign air carriers. It refers to what it calls the obvious incentive for funneling traffic via New York and thence via trucking facilities to its destination as favoring the foreign exporters and foreign air carriers in that shipments handled by those parties generally originate or terminate their air journeys at New York due to the fact that foreign air carriers do not, for the most part, operate cargo schedules at other east coast gateways. For these and other reasons which are considered in more detail later herein, the Virginia Parties urge that the Board take affirmative steps to cure the inequities in the existing rate system by refusing to approve any IATA rate resolution which fails to provide, as a minimum, that Washington be commonrated with New York in the matter of air cargo shipments between Washington and points in Europe.

Washington. Similar to the positions taken by Baltimore and the Virginia Parties, the Metropolitan Washington Board of Trade urges that Washington be commonrated with New York for transatlantic air cargo service. It points to the fact that Dulles is fully equipped to handle large amounts of air cargo but that its 1970 experience shows only some 7,694 tons of freight were accommodated. The latter amount is hardly significant when considered in the light of 227,604 tons of transatlantic air cargo moving in and out of New York.

Testimony provided by the general manager of Dulles indicates that the airport has all necessary equipment, including two cargo warehouse buildings, plus a third such edifice under construction, to handle not only all of its existing cargo, but adequate capabilities to handle a far larger share of this traffic as well. Considerable other data were submitted by Washington designed to show the inequities of the existing rate structure which it alleges results in obvious preference to New York and prejudice to Dulles. The city claims the situation is directly caused by the much higher add-ons for transatlantic shipments flowing between Washington and European points via the New York gateway, compared to foreign shipments from European points moving between the London and New York gateways to Washington and the surrounding area. Even assuming the 204 greater miles involved and additional costs incurred as a result thereof, Washington maintains that such costs are more than offset when consideration is given to the traffic congestion at JFK and the extra taxiing time involved, plus the greater terminal handling costs, as well as the high incidence of pilferage and theft of cargo shipments moving through the JFK facility.

Philadelphia Parties. This city takes the position that any adjustment in the transatlantic cargo rates at Baltimore/Washington must also be reflected in the rates applicable to Philadelphia if unjust discrimination and rate abnormalities are to be avoided. The city is in accord with

the positions taken by Washington/Baltimore in that it also urges that transatlantic cargo rates at Philadelphia should be commonrated with New York.

In support of its position relative to its importance as a transatlantic cargo gateway point, the city points out that it developed 54,300 tons of air freight in 1970, compared to 37,600 tons generated in the same period at Friendship, Dulles, and National airports serving the Baltimore/Washington area. It also submits that its terminal cost for handling transatlantic air freight is considerably lower than similar costs of other cities involved herein. For example, it points out that the average terminal cost per cwt of transatlantic cargo is $1.81 compared to $2.08 for Detroit; $2.61 for Cleveland; $3.22 for Boston; $3.25 for Baltimore (Friendship); $3.48 for Washington (Dulles); $4.49 for Washington (National) and $3.49 for Chicago. With respect to New York it refers to the fact that the average terminal cost per cwt of outbound and inbound transatlantic freight is $3.11 at JFK and $3.17 at LaGuardia and Newark.

Boston Parties. Although this city and New York are commonrated, the distance between Boston and Europe is shorter than that between New York and Boston. The Port Authority and Chamber of Commerce which represent the interests of the city take the position that the North Atlantic cargo rates should be restructured on a basis proportionate to mileage and that IATA rate agreements presented for the Board's consideration should be disapproved pending the adoption of rates in accord with this principle.

This city submits that on a per mile basis, both general and specific commodity rates applicable to Boston fail to reflect the lower mileage differential and as a result they are considerably higher than comparable New York rates. The city asserts that existing inequities in the rate structure cannot be attributable to the involvement of additional

costs. In support thereof, it points out that on a unit basis terminal costs at Boston are generally lower than those at New York, while the average terminal cost per hundred weight approximates that of New York. In Boston's view, the latter fact is significant when the larger freight volume available at New York is noted and the fact that lower costs normally result from higher volumes.

Boston also calls attention to an additional disadvantage it incurs when cargo in considerable quantities is frequently trucked to New York in order to take advantage of rate reductions through consolidation. A restructuring of the rate system would, in Boston's opinion, cure the situation by making it possible for Boston to enjoy the economic benefits of consolidation rather than requiring shipments to be routed through the New York gateway. As a concluding argument, Boston maintains that IATA cargo rate agreements reached without regard to mileages involved are adverse to the public interest and the Board should withhold approval of any such agreements absent full compliance with the mileage concept.

Chicago Parties. This city and its Association of Commerce and Industry entered appearances and actively participated in representing Chicago during all phases of the proceeding. Unlike Washington, Baltimore and Philadelphia, which advocate commonrating with New York, Chicago urges that rates applicable to Chicago should reflect the shortest direct authorized service and should be predicated on the relationship which the direct mileage bears to the New York mileage to and from the same European points.

The city argues that the advent of large jet equipment, capable of providing direct service between inland U.S. points and Europe, has not only made obsolete the traditional concept of constructing cargo rates via New York, but has resulted in prejudice to Chicago area shippers and consignees as well. The city expresses the opinion the

Board has requisite power, under Section 1002(f) of the Act, to correct inequities in the existing rate structure. In the event the Board should reach a contrary conclusion, Chicago urges the Board to deny approval of IATA Resolution 590, pursuant to Section 412 of the Act, insofar as it requires carrier unanimity for rate changes. In the city's opinion, the agreement should be revised so as to allow each carrier the right to take independent action on matters pertaining to rates.

Although Chicago concedes that Pan American's proposal to modify the arbitraries presently applicable in constructing rates for U.S. interior cities is some improvement over existing add-ons since they decrease with each weight bracket, they nevertheless do not achieve or maintain the desired rate relationships. In this connection the city cites, for example, that a 150-pound shipment of "yarns and thread" would take a 36 cent per pound rate from New York to London, plus an 8 cent add-on, making the rate 44 cents per pound for a Chicago to London shipment. The latter figure is 22 percent higher than the New York-London rate, wheeas if the rate were on the basis of direct mileage, it would be only 14 percent higher.

With respect to general commodity rates, the city admits that for shipments of less than 660 pounds the existing add-ons are somewhat less than if based on direct mileage differentials, but on shipments exceeding that amount the rates are higher than under the mileage formula it advocates. Chicago argues that its formula would be preferable to the soluton offered by Pan American which would apply only to specific commodity rates and include no revision of the general cargo rates. Moreover, Pan American's proposal would, in Chicago's view, impose a relatively higher differential on the lower rates and a comparatively smaller add-on to the higher rates.

Cleveland. While this city participated in the Prehearing Conference it did not file the various information

requests which were requested to be submitted prior to the hearing. Shortly before the hearing, however, the city did submit a statement of position reciting that "Cleveland met with unusual and unanticipated difficulties in attempting to deal with the information requests addressed to it * * * and for that reason information responses have not been filed in its behalf."

The statement also contains argument that the existing transatlantic cargo rates between Cleveland and points in Europe are higher, distances considered, than the transatlantic rates to and from New York. The aggregate of rates applicable to Cleveland are, in the city's opinion, excessive, unreasonable and unlawful, as well as being unlawfully prejudicial to and discriminatory against Cleveland. In addition, it is argued that such rates are unlawfully preferential of and discriminatory toward New York. The city maintains that the unlawfulness of these rates will be removed only if Cleveland is accorded rates which reflect by percentages the city's distance over New York, as compared with New York's transatlantic distances to the European markets.

Detroit. This city takes much the same position as Chicago in that it maintains the evidence establishes that the existing rate structure is unduly and unjustly discriminatory and prejudicial to the interest of Detroit and results in undue and unreasonable preference and advantage to both New York and Boston. It further argues that the rate system is adverse to the public interest by reason of the fact that business and industrial firms located within the Detroit area have been disadvantaged and have suffered economic losses flowing from the discrimination and prejudice to Detroit, and the preference and advantage to New York and Boston.

A cure for the inequities of the existing rate structure lies, in Detroit's opinion, in the establishment of rates predicated on the relationship to the mileages flown. In

this connection it submits that the mileage differential between Detroit and New York, on the one hand, and representative points in Europe, on the other hand, range from a low of 7.8 percent for Munich, to a high of 13.7 percent for Oslo, and a 9.1 percent differential for London. By way of comparison, the rate differential for a 440-pound shipment of auto parts—a prime cargo candidate—between Detroit and London via New York, is 31.5 percent although there is a mileage differential of only 9.1 percent.

The impact of the discrimination and prejudice has, in Detroit's opinion, become more pronounced with the introduction of large jet aircraft. In this connection a witness for the city testified that while the IATA rate system may have been appropriate when air freight service was in its infancy and available through only a few major gateways, shippers have become increasingly dissatisfied with a rate structure that is based largely upon shipments moving via New York for transfer to an overseas carrier. The same witness also offered the observation that with the tremendous advancements in equipment there was no valid reason for the service pattern to follow old and outmoded lines, particularly where the system also in[illegible]lved rate penalties. In these circumstances, Detroit argues that the existing ratemaking system has failed to keep pace with improved services now available for air freight moving to overseas locations, many of which are direct flights originating or terminating at inland points.

The Carriers

As noted earlier, only Pan American, Seaboard and TWA actively participated in all phases of the investigation, although the Board named as parties to the case all IATA air carriers, both foreign and domestic, who are participants in North Atlantic air cargo service, whether of a single carrier nature or who share in through service pursuant to joint rates. While several carriers did enter

an appearance at the opening of the hearing and from time to time thereafter, the above-named carriers bore the brunt of carrier participation in the establishment of the record herein.

Seaboard.[7] This carrier takes the position that the complaining cities have failed to meet the burden of showing that the existing rate structure is unjustly discriminatory, unduly preferential, or unduly prejudicial. It emphasizes the word "unduly" as a demonstration that the statute requires that the discrimination, preference and prejudice must, in the scheme of things, fall beyond the normal or ordinary connotation of those words if it is to be found unlawful. Seaboard argues that contrary to such a showing, this record discloses that the transatlantic cargo rates bear a reasonable relationship to costs and to geography and hence no shipper or locality has been unjustly or unduly discriminated against, or unjustly or unduly prejudiced.

Insofar as the complaining cities seek a common rate with New York, Seaboard submits that such a requirement would not only violate established Board policy, but is contrary to all pertinent decisions of the Interstate Commerce Commission, the Federal Maritime Commission and the Federal courts.

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[7] Up until a short time ago Seaboard had been an active member for a number of years in the affairs of IATA. Its IATA membership continued through all phases of the investigation herein, including the hearing and the filing of a brief with the Examiner containing Seaboard's position and argument on the issues involved. It was thereafter announced in the public press that Seaboard gave notice on September 16, 1971, of its resignation from IATA, effective on October 16, 1971. As far as is known, none of the parties to this proceeding have been officially notified by Seaboard of that carrier's resignation from IATA or of its nonparticipation in the affairs of that association. The findings and conclusions reached herein are therefore without regard to Seaboard's departure from IATA.

The carrier also maintains that the claim that shippers in the socalled "hinterland areas" must pay more for shipping via Batimore and Washington than via New York is not correct. Moreover, the results of the survey conducted by the cities to support the latter premise is, in Seaboard's opinion, negated by other evidence in the survey demonstrating that hinterland traffic would continue to move as it presently does, irrespective of whether Baltimore and Washington were to be commonrated with New York. While Baltimore and Washington contend that through rates, between points in the hinterland areas and Europe, cannot be published under IATA rules, the fact of the matter is that through rates can and are published from hinterland cities irrespective of whatever routing is used.

With further reference to the survey of hinterland shippers, Seaboard questions the reliability of results shown therefrom, particularly on the ground that the questions in the survey were framed so as to influence the responses and elicit favorable answers, rather than those based on actual experience. A further weakness in the survey which, in Seaboard's view, requires its elimination as an indicator of shipper preference, is the fact that out of 2,500 hinterland shippers who were questioned relative to whether they would route additional European bound cargo traffic through Dulles and Friendship airports if cargo rates were equalized with New York, only 11 such shippers responded in the affirmative whereas the remainder gave no response. In any event, Seaboard takes the position that the existing service pattern will continue to be followed by shippers from hinterland points so as to utilize the superior service and enjoy the forwarder benefits available at New York.

Another factor raised by Seaboard in opposition to the commonrate requests is that a change of this kind in the existing rate structure will adversely affect tranatlantic carriers through revenue losses with the only alternative to

recoupment of such losses being an increase in the rates for other U.S. cities. An increase of this character would more than likely have a marked impact on the entire international cargo rate system which, in Seaboard's opinion, could raise a host of sensitive intergovernmental problems that might well precede adverse action by foreign governments whose carriers would be disadvantaged thereby.

While Seaboard recognizes that commonrating does exist with respect to various European points, it calls attention to the fact that upon the insistence of the U.S. carriers this ratemaking method—which it views as "improper"—is gradually being eliminated from the IATA rate system in Europe.

Finally, Seaboard argues that there is a total lack of evidence to support the claims of the complaining cities and it urges that the investigation be dismissed without disturbance of the existing rate structure.

Pan American. This carrier has long been an aggressive competitor in the transatlantic freight market. In the instant case it takes the position that although most general commodity rates are reasonably related to mileage, many specific commodity rates to interior points are considerably higher than justified by the additional mileage involved. With respect to the former, Pan American cites the fact that although the Chicago-London mileage is 14.4 percent greater than the New York-London mileage, the general commodity rate at 100 pounds is only 7.4 percent higher and at 440 pounds it is only 12.2 percent higher than the London rate.

A somewhat similar relationship exists with respect to general commodity rates for Philadelphia, Cleveland and Detroit, but not for Baltimore and Washington. While at some weightbreaks certain specific commodities actually carry a lower rate per mile at interior points than at New York, the add-ons are, in general, somewhat higher than an amount related to the mileage differential between New

York and the interior point. The reason for the discrepancy between rates and mileage and the unnecessarily high add-ons for interior points lies, in Pan American's opinion, in the interest of foreign carriers serving only New York and U.S. domestic carriers in avoiding loss of revenue through prorating. Pan American maintains that the domestic carriers which participate in the haul of international cargo between interior points and New York usually demand the full domestic rate, whereas the foreign carrier which serves only New York must absorb the additional cost and, at the same time, maintain an economic operation. In these circumstances, carriers such as Pan American which are authorized to provide direct service to many interior points are usually outvoted in IATA conferences by those carriers desiring to avoid revenue loss occasioned by the prorate. For this reason Pan American supports a modification of the present rate structure so as to allow for a system predicated on a mileage basis.

Pan American opposes commonrating Baltimore and Washington with New York on the ground that such a system would not give equal treatment to all east coast gateways. As an example it points out that the Baltimore-London segment embraces some 635 miles, or a 5 percent greater distance than the 3,456 mile New York-London segment. It submits that the solution proposed by Baltimore would not do equity but would result in granting Baltimore an undue preference.

Moreover, Pan American argues that the rate reductions inherent in the suggestions advanced by Baltimore and Washington would not generate sufficient additional traffic to offset revenue losses. The carrier argues that to offset this revenue loss the traffic must increase more than the amount of the rate reduction. As an example, it asserts that a 10 per cent rate reduction would require a 12 percent increase in tonnage. The carrier submits there is a scarcity of evidence, other than that shown in shipper survey data offered by Baltimore and the Virginia Parties—which

are of questionable value—which would establish that the necessary stimulatory traffic will be forthcoming. As a matter of fact, Pan American points out that the Baltimore survey shows that a 5 percent rate reduction would result in an increase of only 1 percent of the outbound traffic and 3.2 percent of the inbound traffic.

Pan American submits that the record clearly indicates that shippers prefer to use the New York gateway rather than Baltimore or Washington and will continue to show such preference for the reason of the greater number of frequencies and the availability of direct service to many more destinations. The carrier nevertheless concedes that some traffic will be diverted from New York to other gateways in the event the existing rate structure is modified. It submits, however, that forecasts offered by Baltimore and Washington are clearly overstated and the survey conducted by the Virginia Parties is particularly vulnerable to criticism because of the obviously biased instructions which accompanied the questionnaire sent to various users of air cargo service. In connection with the latter Pan American, expressing views similar to those of Seaboard and TWA, urges that the results of the survey be rejected outright, as was done by the Board in *Air Traffic Conference of America*, Order 71-8-118.

While Pan American acknowledges the existence of extensive commonrating involving many points in Europe and asserts the practice is harmful and not in the best public interest, it points out that U.S. carriers have made vigorous efforts toward alleviating the situation which, while not totally successful, have resulted in some progress being made. In the carrier's opinion, these efforts could be substantially hindered if the Board were to sanction the commonrate structure advocated by Baltmore and Washington.

Finally, Pan American refers to the Board's opinions in the *Hawaiian Common Fares* cases, 10 C.A.B. 921 (1949);

and 37 C.A.B. 269 (1962), as being in accord with Pan American's advocacy of a modification of the existing rate structure based upon the distances traveled in the transportation of cargo shipments. In the instant case, the carrier argues that there are no "special circumstances" as referred to in the *Hawaiian* cases, which would justify commonrating, as sought by the complaining cities here.

TWA. On the basis of the record established herein, it is this carrier's position the evidence will not support a finding requiring any of the U.S. points in issue to be commonrated with New York. In support thereof, TWA argues that the evidence shows the differentials between the rates and charges are fully justified by cost differences which are related, for the most part, to the varying distances between the several points—whether calculated direct or via New York. On this basis the carrier submits the rates and charges applicable between European points and the U.S. points in issue do not constitute unlawful preferences, prejudices, or discriminations. In addition, the carrier asserts that the relationship between the rates and charges are also not unlawful and the Board is therefore lacking in power to require changes in the existing rate structure and may therefore not condition IATA Resolution 590 in any respect.

While TWA subscribes to the proposition that the overall best interest of the public and the carriers is not served by existing commonrating practices between the various European gateways, it argues that the practices in question are largely motivated by political considerations and should not be advanced as precedent in the instant case.

In support of the foregoing position, TWA refers to the fact that the questions involved in the investigation are not new or novel and were brought before the Board by some of the same complainants nearly a decade ago. Moreover, the identical question—but relating to passenger

fares only—was before the Board as recently as 1969 and considered in Order 69-7-149.

TWA submits that those cities which advocate commonrating have failed to support their claim of prejudice and have also failed to establish that the commonrating would provide a solution to their problems. In this connection the carrier maintains that to remove what the cities allege as being unlawful through the method they advocate would in itself be unlawful in the absence of special circumstances. It argues that it has long been settled in transportation law that the sale of different quantities of transportation for the same price, i.e., commonrating, creates undue preference and undue prejudice. In this connection it points to the fact that the Board itself has firmly established the principle that common fares as such, when applied to consecutive points are unsound and may be justified only in special circumstances, such as compelling competitive relationships.[8]

Since the complaining cities have not, in TWA's opinion, supported with substantial evidence the allegation that the present rate structure is unlawful, no grounds exist for tampering with the present system. In the latter connection, TWA points out that since the IATA Conference in 1963 various Baltimore parties have specifically raised the issue related to the lawfulness of the disparity of rates between Baltimore and New York but in each case the Board rejected its objections and approved the IATA resolutions. The carrier cites Orders E-19359 and E-19424, 38 C.A.B. 1046 at pp. 1047 and 1051, respectively.

While the mid-Atlantic coast gateways of Baltimore, Washington and Philadelphia involve less mileage differ-

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[8] In support of this principle the carrier cites the Hawaiian Common Fares Case, 10 C.A.B., 921, 924-928 (1949); and the Hawaiian Common Fares Case some 13 years later [37 C.A.B. 269, (1962)], where the Board reaffirmed its rejection of common faring practices.

entials compared with New York than Cleveland, Chicago and Detroit, the differentials as far as costs are concerned are not insignificant, in TWA's view. For example, the carrier submitted an exhibit showing that the 5 percent mileage differential between Europe and Baltimore *vis-a-vis* Eurpoe and New York is 11 percent higher in per unit flying costs based on aircraft operating costs in 1969. In these circumstances, TWA argues that the rate differentials are justified in order to cover the cost of operating the greater distances and should not be held to be the product of undue prejudice or preference.

Similar to the position taken by other carriers herein, and for the same reasons, TWA asserts that the greater volume of traffic would still continue to prefer New York even in Baltimore/Washington were commonrated with that city. Moreover, in the event of the establishment of a common rate, the general public would be required to pay the increased charges that would necessarily flow therefrom. In this connection, TWA submits that since the existing rate structure is related to cost and distance, the carriers could not be expected to provide service to Nw York and to a more distant point at a rate level which reflected only the cost at New York. In view of this fact, TWA maintains that if the Board were to find the existence of undue preference or undue prejudice in the existing rate structure, the removal of such could be accomplished economically only by way of a higher rate for much of the transatlantic cargo traffic.

The Intervenors

Petitions for leave to intervene were filed by the Port of New York Authority (Port Authority), City and Chamber of Commerce of Memphis, Tenn. (Memphis), City of Philadelphia and the Greater Philadelphia Chamber of

Commerce, Metropolitan Washington Board of Trade and the Department of Transportation (DOT).[9]

On brief the Port Authority supports the establishment of rate levels based on the shortest operated mileage in the various markets at issue. It submits that as additional points develop sufficient traffic to justify scheduled transatlantic nonstop service, the rates for such points would not be higher on a per mile basis than are rates for shipmpents via New York. On the other hand, the Port Authority makes the point that if the only service available is less direct than nonstop service, the transport charges should be based on the shortest mileage actually flown—not the nonstop or great circle mileage.

This intervenor opposes commonrating Baltimore/Washington with New York on the ground that such rates would be unduly preferential when considered in light of the fact that both Baltimore and Washington are a greater distance from Europe than is New York. In this connection the Port Authority argues that in the event of such commonrating, the basic rate of the IATA carriers would necessarily be increased in order to offset their revenue loss.

While Memphis and DOT entered appearances and participated in the hearing, neither of these parties expressed any position with respect to the issues in the case, nor did either intervenor file a brief which might indicate their respective positions.

The Bureau. Much of the data submitted by the Bureau, at the hearing and in argument on brief, is considered later

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[9] Since both Philadelphia and Washington were named as parties to the proceeding, the petitions of those cities for leave to intervene were moot and were therefore dismissed. The evidence submitted by those parties and the positions taken with respect to the issues were considered earlier in conjunction with the discussion pertaining to other cities involved in the case.

herein in connection with the conclusions reached. It is sufficient to note at this time that the Bureau is of the opinion that the existing rate structure is unduly preferential and unduly prejudicial. It advocates that, pursuant to Section 1002(f) of the Act, the rate structure be altered so as to correct such preference and prejudice and that the Board issue an order requiring air carriers and foreign air carriers to discontinue charging the said preferential and prejudicial rates. The Bureau takes the further position that the agreements granting such preference and prejudice are adverse to the public interest; in violation of the Act, and accordingly should be disapproved, pursuant to Section 412(b) of the Act.

The most effective method of correcting the inherent inequities of the existing rate structure is, in the Bureau's view, by adoption of the mileage concept advocated by Pan American and certain municipalities including Chicago, Cleveland, Detroit, Philadelphia and, for differing reasons, by Boston. In the Bureau's opinion, this method would present a more desirable solution in correcting the infirmities permeating the present rate system than would a method which relied upon published arbitraries, or a combination of the mileage concept for some of the points with the remainder, such as Baltimore, Washington and Boston, being commonrated. While not discounting completely the merit in the use of arbitraries, the Bureau does not believe an equitable rate structure would evolve from this method. By the same token, it is the Bureau's opinion that a combination of the mileage approach, in conjunction with a common rate for the east coast cities, would not only fail in the establishment of an equitable rate system, but would more than likely create an even more confused situation than that which now exists.

In further opposition to the commonrate principle advocated by Baltimore, Washington and the Virginia Parties, the Bureau takes a dim view of the weight accorded the surveys upon which those cities appear to place heavy re-

liance for support of their commonrate argument on the ground that the assembled data is of questionable value. Moreover, the Bureau calls attention to the Board's holding in a relatively recent case where, although it approved a tariff involving a common rate, it said: "Nevertheless, the Board does not endorse extensive commonrating, since in most cases it would not be consistent with the principle that rates should normally rise with the increase in the length of haul, because costs increase with distance." [10]

Additional factors advanced by the Bureau in opposition to the commonrate principle is that such action, at this time, might adversely affect present efforts by U.S. carriers to reduce the number of European commonrated points, and the fact that in the event such points as Baltimore, Washington and Boston were commonrated with New York, other Atlantic coastal points such as Atlanta and Miami would more than likely be disadvantaged and unduly discriminated against.

Still another consideration which, in the Bureau's view, militates against the commonrate approach to resolving the present rate problem is that the implementation of such a system would require an amendment to Resolution 014(b) of the IATA Traffic Conference so as to designate Baltimore, Washington and Boston as construction points. The result would most likely be a tariff filing of extraordinary volume which could well create areas of much confusion involving the international rate structure.

In light of the foregoing considerations, the Bureau reiterates its opinion that a mileage oriented rate structure offers the best solution to the rate problems reflected by the record. To accomplish the result it envisages, the Bureau suggests a realignment of the rate structure so as to conform to a true mileage base. It suggests the use of the IATA mileage manual as an appropriate guide in this respect.

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[10] The Flying Tiger Line Inc., Rates for Economy Service, Order E-26357, p. 2, adopted February 14, 1968.

Thus, whether the rate be applicable to general commodities, specific commodities, or involve containerization, it would be computed by the establishment of the per mile rate between New York and a European point which would constitute the per mile transatlantic rate irrespective of whether the cargo was flown out of another U.S. gateway. In the latter event, the full transatlantic rate would be determined by multiplying the above-noted basic New York-European rate by a mileage factor obtained from the established distances between points as shown in the IATA mileage manual.

Finally, the Bureau calls attention to the fact that with reference to minimum charges, the New York rate is lower than at other points. As noted elsewhere herein, the minimum charge at New York is $22 per kilogram, while at other points the minimum charge is generally $25 per kilogram. Since mileage differentials are not relevant in considering the establishment of minimum charges, the Bureau suggests the elimination of the $3 add-on so that all minimum charges would be reduced to the same level as that applicable to New York.

Conclusions

In General. At the present time IATA cargo rates for the North Atlantic are arrived at by first establishing the rate level applicable for the New York-London leg of the transportation.[11] Rates applicable for points beyond the New York and London gateways are fixed by the addition of arbitraries to the agreed upon rate for the basic market, i.e., New York-London.

General commodity rates are arrived at through the use of arbitraries which are frequently lower than the domestic

[11] Although Montreal is also a gateway in conjunction with New York in constructing the basic North Atlantic cargo rate, the point is not of particular moment in the disposition of the issues here involved and consequently only passing reference is made to the city.

freight rate between New York and the interior point. At the 1969 IATA Traffic Conference held in Athens, specific commodity rates for Philadelphia, Baltimore and Washington were agreed upon by the addition of arbitraries to the basic New York-London rate. Such rates for the remainder of the country, however, are created by a combination of the New York-Europe rate with the lowest rate available for the domestic segment. In that manner a through specific commodity rate from the U.S. interior point in Europe is brought into being.

Because of the use of constructed add-ons and arbitraries there is a wide variance between the ratios of through rates and mileage compared to the New York-London leg. In lower weightbreaks general commodity rates compare somewhat favorably with the mileage differential, while at higher weightbreaks general commodity rates are, for the most part, at greater levels than justifiable in view of the limited mileage differential between the interior point and New York. The situation is even more pronounced with respect to specific commodity rates where the add-ons are mostly greater than warranted by the mileage differential between the New York gateway and the domestic interior point. At only a few weightbreaks are there exceptions to this normally prevailing rule.

The foregoing is seemingly recognized, at least in some degree, by the U.S. transatlantic carriers. In general, the reasons for the wide discrepancy between rates and mileage and the unwarranted high add-ons are ascribed to the self interests of foreign air carriers which serve only New York, and to U.S. domestic air carriers who seek to extract the full domestic rate and thus avoid any revenue loss through prorating. In other words, the domestic air carriers are reluctant to participate in a joint rate which will not provide an equal measure of the return that would be enjoyed absent the joint rate, while the foreign air carrier serving only New York is unwilling to absorb any loss which reduced add-ons might produce. Thus, the record reveals that

where attempts have been made by some U.S. transatlantic carriers to alleviate the situation, they have met with little and mostly no success due largely to the unanimity rule in IATA which permits one participant to thwart the wishes at rate conferences of all of the other conferees.

Legal Aspects. A resolution of the issues involved herein requires that notice be taken not only of the mandates of the statute as set forth particularly in Sections 404 and 1002(f) of the Act, but also that consideration be accorded matters pertaining to Board policy as it relates to the overall public interest enunciated in Sections 102 and 412(b) of the Act.

The prohibitions contained in Section 404(b) enjoining "undue or unreasonable preference or advantage" and "any unjust discrimination or any undue or unreasonable prejudice or disadvantage", are not absolute by their own terms.[12] To be unlawful something more is required than mere preference, prejudice or advantage of a general or normal character—it must be of an "undue" or "unreasonable" nature.[13] It has long been held that whether the circumstances in a given case fall within the latter category is not a question of law, but one of fact.[14] As stated by Mr. Justice Stone for the United States Supreme Court: "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as pe-

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[12] Section 404(b) reads in full as follows: "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[13] Texas & Pac. Railway v. Interstate Com. Com. 162 U.S. 197, 219.

[14] Board of Trade v. United States 314 U.S. 534, 546 (1942), and cases therein cited.

culiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." [15]

The Board has heretofore noted that Section 404 follows in large measure Section 3(1) of the Interstate Commerce Act, as amended, and in determining issues relating to airline rate inequities, it has extended considerable weight to decisions of the courts and of the Commission bearing upon that section of the Interstate Commerce Act.[16] It may also be noted that provisions similar to those found in Section 3 of the latter Act may also be found in Section 815 First of the Shipping Act,[17] which makes it unlawful for any common carrier by water: "To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: ***".

While the language in Section 3(1) of the Interstate Commerce Act is almost identical to that in Section 404(b) of the Federal Aviation Act, as amended, and the Board has looked with favor on decisional precedents flowing from interpretations of the Interstate Commerce Act, it does not imply that those precedents should be precisely followed in every instance. The mere acknowledgement that what constitutes "undue" or "unreasonable" preference or advantage is a question of fact to be determined from all the circumstances of a given situation, is sufficient to remove it from the restraints of a cut and dried precedent.

Moreover, decisional precedents found in judicial or administrative holdings appertaining to railroad or maritime

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[15] Swayne & Hoyt, Ltd. v. United States 300 U.S. 297, 304.

[16] See Military-Tender Investigation 28 C.A.B. 902, 919-920 (1959).

[17] 46 U.S.C. 11477, Sec. 815 First.

regulation—particularly litigation involving commonrate considerations—are hardly controlling due to the dissimilarity in the modes of transport. What often required hours, and even days, to accomplish at the time the surface travel precedents were being established, is measured in terms of minutes in the movement of cargo by air.

The Board has itself recognized this fact and while frequently giving more than passing notice to decisions of the I.C.C., particularly when sections of the Federal Aviation Act that had been patterned after parts of the Interstate Commerce Act were under scrutiny, it has explicitly pointed out that there were marked differences in the provisions of the two statutes which frequently required rulings at variance to those of the I.C.C. In the *Caribbean Area* case [18] the Board stated:

> "We have before relied upon the construction of comparable provisions of the Interstate Commerce Act as a guide in determining our powers under the Civil Aeronautics Act and shall, in all likelihood, have occasion to do so again in appropriate situations. However, blindly to adopt rulings under another act without regard to real and substantial differences between the provisions of the two statutes, the purposes underlying their enactment, and the situations with which the two regulatory agencies may be faced, would be to fail in the duties entrusted to us."

In both *Hawaiian Common Fares* cases, *supra*, the Board made it plain that it may fix rates only upon a finding that the carrier-initiated rates are unlawful. In connection with the decisions in the two proceedings, it may be well to note at this time—particularly in light of the emphasis placed on those decisions by the carrier parties—that the Board in the first case rejected, pursuant to Section 1002(d) of the Act, the establishment of certain proposed common fares involving the mainland-Hawaii fare structure as un-

[18] 9 C.A.B. 534, 549 (1948). See also Transatlantic Charter Investigation 40 C.A.B. 233, 270 (1963), footnote 51.

lawful and concluded that "* * * common fares to consecutive points are ordinarily unsound in principle, and in the absence of special justification must be found unjust and unreasonable."[19] In the second *Hawaiian Common Fares* case the Board noted that it still adhered to the views expressed in the earlier case for the reason that as a general proposition, charging the same fare for a longer distance as for a shorter one was unsound as a ratemaking principle and not justified under the Act. The Board, nevertheless, went on to say:

> "However, as the 1949 opinion clearly indicates, the Board did not find that the principle set up an absolute bar to common fares, but only that such fares should not be allowed in the absence of special justification. On the comparatively limited record before it in that proceeding, the Board found no such special justification. Here, however, we have before us a comprehensive record which contains voluminous evidence bearing on the need for common fares and the special circumstances which justify them."[20]

While it is recognized that a finding of unlawfulness must first he made prior to a rejection of rates predicated on an inequitable rate structure, it should also be observed that the rates complained of in the instant case are not the product of a single entity, but are the result of understandings reached by a collective group of carriers and reduced to a written contract or agreement.

In these circumstances the Board may find that any such resolution, agreement or contract, when brought before it for its imprimatur, contains provisions that are adverse to the public interest, and the resolution, agreement or contract may be rejected, pursuant to Section 412(b) of the Act. If the document is opposed to the provisions of the Act, it is obviously unlawful. Thus, where a finding is made

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[19] 10 C.A.B. 921, 928 (1949).

[20] 37 C.A.B. 269, 275 (1962).

that all or any part of an IATA agreement is adverse to the public interest, the illegality of the agreement and the rate or rates flowing therefrom is established. The Board is, of course, empowered to disapprove, as unlawful, not only the agreement, but the rates themselves as the resulting product of the unlawful understanding.

With respect to the issues relating to whether the IATA resolutions are adverse to the public interest and in violation of the Act, it is worthy to note at this time the misgivings expressed by the Board in granting approval to certain IATA agreements reached at the Athens meetings in April and May of 1969. In Order 69-10-30, adopted October 7, 1969, it said:

> "The Board, however, continues to be concerned with the absence of rates for particular commodities of peculiar interest to Boston/Philadelphia/Baltimore/Washington or, for all practical purposes, to any other U.S. city used as a gateway for transatlantic services. As discussed in Order 69-8-174, *supra*, this situation may stem, in part, from the financial interest of those carriers authorized and providing service only at New York and their desire to preclude competition from carriers serving other cities. There are, therefore, serious doubts that the IATA carriers should continue to have antitrust immunity from their actions which may have effectively precluded the establishment of specific commodity rates at U.S. gateway cities beyond New York. As indicated, the Board, in the course of the investigation [referring to the instant proceeding], will have an opportunity to review in depth the matter of specific commodity rate agreements and to reevaluate the question of whether or not the specific commodity rate machinery operates in a fashion to warrant antitrust immunity."

Omitting the nonessentials, the foregoing pages contain in abbreviated form, a fair representation of the methods employed in constructing international cargo rates over the North Atlantic. There is also reflected the applicable law used in determining whether the end product of that rate

structure results in a system of rates opposed to the best interests of the public and hence is unlawful.

The Problem. As will be seen in the pages following, there is abundant evidence to show that the existing rate structure for the transportation of cargo over the North Atlantic is inequitable and that the record fully justifies and supports a finding that the present system results in rates that are unduly preferential, unduly prejudicial and unjustly discriminatory.

It will also be seen that the factors going to make up these conclusionary findings are wide ranging in their impact on the operations of U.S. carriers and shippers alike who wish to maintain their competitive positions in the air cargo business over the North Atlantic on a fair and equitable basis. To achieve and hold this status will require significant amendments to the present rate structure.

Until recently general commodity rate differentials between Baltimore/Washington and New York were approximately from five to six cents per pound. These rates were later reduced with the introduction and approval of arbitraries at the IATA Athens Conference to where they now range from two to six cents per pound, depending on the weightbreak, for such major destinations in Europe as London, Frankfurt, Glasgow and Rome, etc. Similar reductions were effected with respect to various specific commodity rates.

However, the above reductions have had little or no salutory effect on the movement of cargo by air in and out of Baltimore's Friendship Airport. Almost simultaneously with the establishment of the reduced arbitraries, all-cargo flights were entirely eliminated. Prior to their elimination these services, numbering seven inbound and four outbound weekly frequencies, were providing Baltimore shippers with a cargo capacity of 660,000 pounds. As of June 1970 the only cargo service available at Friendship was via combination aircraft on 14 inbound and seven outbound weekly

flights with a total capacity of 210,000 pounds. In 1971 the service further deteriorated to seven inbound and seven outbound flights, providing a capacity of only 140,000 pounds weekly. Thus, with the introduction of lowered rates, cargo space available at Friendship Airport slipped from 660,000 pounds to 140,000 pounds weekly.

While the reason underlying the deterioration in the cargo service available at Friendship cannot be pinpointed with absolute certainty, it is fair to assume much of the cargo traffic which formerly moved in and out of Baltimore by air now moves to New York via trucking facilities so as to avoid payment of even the lowered arbitraries which became effective subsequent to the Athens Conference.

The record is clear in showing there is a substantial volume if North Atlantic cargo traffic now moving between New York and other U.S. coastal cities, as well as U.S. interior points. Much of this traffic is routed via truck to and from New York not only by shippers and consignees but, in a great many instances, by the air carriers themselves. There is considerable testimony in support of a showing that the use of trucks in transporting North Atlantic cargo between Baltimore/Washington and New York, and which enplanes and deplanes at the latter point, is commonplace. The apparent reason for the employment of surface facilities was generally cited as one of price expediency.[21]

There is little likelihood that anyone would question that the above method of transporting cargo, in other than emergency situations, is in opposite accord with the declaration of policy set forth in Section 102 of the Act, particularly subsection "(a)" thereof, which defines as in the public interest: "The encouragement and development of an

[21] If applied to passenger transportation, the same reasoning would suggest the adoption of a service pattern based on the rather ludicrous notion that transatlantic passengers should be ticketed on surface busses from Baltimore/Washington to New York for connections at the latter point with an overseas air carrier.

air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense".

There can be little doubt but that any improvement in the status of other U.S. gateways for transatlantic cargo traffic is in the public interest, particularly insofar as it affects the foreign commerce of the U.S. Not too long ago, the Board in its decision in the *Domestic Coterminal Points* case [22] said: "Accelerating the decentralization of the total transatlantic cargo flow to gateway points other than New York is in the public interest. Alternative gateways will assure the shipping public of alternative routings in the event New York is temporarily closed down because of weather conditions, and will tend to relieve the delays inherent in shipping via New York that result from congestion." The evidence of record in the instant case fits the Board's observations in this respect like a glove. Crowded conditions, pilferage, etc., are obvious partners of delay and in the regulatory scheme of things it would seem to be incumbent upon the Board to take whatever actions may be required to block the possibility, if not the probability, of the JFK facility becoming oversaturated with demands for international cargo service far beyond its ability to meet.

While cargo tonnage has experienced a great expansion, particularly in recent war years where the military requirements have been heavy, it is fair to say that the present level of demand for cargo space does not greatly surpass, relatively speaking, the air passenger traffic demand in the days of the DC-3. As the art continues to improve and the demands for space continue to grow, cargo tonnages will more than likely reach the point where reliance on one airport facility, such as JFK, will be extremely foolhardy. Under the circumstances, it is clear that whatever may be

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[22] Domestic Coterminal Points-Europe All-Cargo Service Investigation, Order 69-4-140, mimeo., op., p. 13.

done now that will relieve the pressures being built up at JFK is unquestionably in the public interest and, by the same token, it is equally clear that the failure to take such steps is adverse to the public interest.

The commonrate principle is of a widespread application throughout Europe. As an illustration there is attached hereto, as Appendix A, a reproduction from an exhibit submitted by the Baltimore Parties depicting various cities commonrated, at the time of the hearing, in an IATA general commodity tariff at the 220-pound weightbreak. Similar common rates were effective at over and under the 100-pound level, as well as at the 440, 660, and 1,100-pound weightbreaks.

IATA has also approved commonrating in a wide range of specific commodities. For example, evidence of record reveals that 39 European cities are commonrated for transatlantic shipments of aircraft engines and parts in the 1,100-pound category; 33 such cities are commonrated for shipments of yarn and thread at the 100-pound level; 27 cities are commonrated with Frankfurt for leather shipments in the 440-pound class and 40 cities for machinery shipments of 1,100 pounds.

The distance involved between such commonrated points is apparently not a factor. As an example, Athens and Bergen are commonrated for sweaters although the latter city is over 1,400 miles closer to New York than is Athens. Another example is with respect to the shipment of leather from Glasgow/Palma to New York at the same rate, notwithstanding the fact that Glasgow is approximately 700 miles closer to New York than is Palma.

These commonrating practices in Europe adversely affect shippers from the Baltimore/Washington area who are required to pay more than New York shippers to transport similar items shorter distances. Even where an arbitrary is attached to shipments destined to a point in Europe beyond London, the add-ons for such shipments are substan-

tially less than the arbitraries for shipments between U.S. points and Europe, moving via New York. For example, the Dulles-New York arbitrary is three cents per pound for the 203 miles involved, compared with an add-on of only two cents per pound for New York-Rome shipments, presumably to compensate for the 892 additional miles transit beyond London to Rome.

The extensive system of commonrating cities on the other side of the Atlantic results in the equalization of transatlantic rates for groups of competing points situated at widely varying distances from U.S. gateways. A Baltimore exhibit reveals that the rate differentials *vis-a-vis* New York, when applied to U.S. cities for 220-pound shipments, increased 1.4 cents per pound with every 100-mile increase in distance to London, as compared with New York. London rate differentials on the other hand, when applied to European cities, increased only about one-fourth of one cent per pound for each 100-mile greater distance over the London-New York mileage. The proportional add-on applied to Baltimore over the New York transatlantic rates, in general, exceeds the mileage differentials. For example, Baltimore is only 5.3 percent further from London than New York, although the general cargo rates for Baltimore-London shipments range between 6.1 percent and 8.6 percent more than the New York-London rates.

Examples which may be noted in this connection are with respect to the 100-pound general commodity rate between JFK and Stuttgart, where the shipper pays $1.05 per pound for a haul involving 3,916 great circle miles, compared with the Baltimore shipper who pays $1.09 per pound for a shipment moving only 3,666 miles between Friendship and Bergen; or a shipment of 1,100 pounds pursuant to a specific commodity rate (sweaters), between Friendship and Belfast entailing 3,339 great circle miles at 32 cents per pound, compared with a similar shipment between JFK and Barcelona entailing 3,821 miles at only 29 cents per pound.

Equally higher rates are also demanded for general commodity shipments from Washington moving via Dulles to various points in Europe, as compared to rates from New York to the same European points.[23] The attached table, Appendix B, reproduced from an exhibit submitted by the Virginia Parties, graphically illustrates this point. One example shown involves a shipment from Dulles to Munich covering a distance of 4,267 miles where the shipper pays nine cents more per pound for a shipment of 100 pounds than would be required for a like shipment between New York and Rome covering a distance of 4,280 miles. While the penalty payments for shipments from Dulles involve only from one to nine cents per pound, the difference becomes significant when viewed in the light of a 10,000-pound shipment where the penalty to the Dulles shipper represents in the area of several hundred dollars.

The U.S. carrier parties generally appear to oppose the widespread commonrate system as practiced in Europe to almost the same degree they condemn it here. As indicated earlier, these carriers attribute the continuation of this ratemaking system, despite their efforts to have it abolished, to the exigencies of the political situation as it exists in various areas of Europe, together with the fact that U.S. carriers are outvoted when the question of more equitable, if not comparable, treatment of cities on this side of the Atlantic arises in IATA conferences.

Although not meeting with any substantial degree of success in this regard, the U.S. carrier parties resist approval of commonrate status with New York for a cluster of cities such as Baltimore, Washington and Philadelphia on the ground that favorable action on the complaints of the municipalities will somehow not bode well for any future efforts looking toward eliminating the extensive commonrate sys-

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[23] As noted earlier, Baltimore and Washington are commonrated by IATA and all references to the rate level at the former city are equally applicable to the latter point.

tem in Europe. These U.S. cities are all located within a relatively short distance of each other—none of which is more than two or three miles beyond a 200-mile perimeter from New York. Because of the heavy concentration of traffic at and between these points, the entire area between Washington and Boston has taken on a particular significance when viewed in the light of its unique transportation requirements. In this respect the section has been variously referred to by the Board and others as a "megalopolis", the "Northeast Corridor", etc.[24]

Allowing for the foregoing, it is not to be assumed that the Board should ignore almost entirely not only the clear policy mandates of the statute set out in Section 102 of the Act, but also those charges of a prohibitory nature relating to undue preference, undue prejudice and unjust discrimination contained in other sections of the Act heretofore cited.

If the U.S. national interest requires commonrating with respect to certain U.S. cities, it goes without saying that that factor must be paramount to the exclusion of considerations relating to internal political matters in foreign countries. This is of particular importance where, as here, the rate system that has evolved is of a prejudicial, preferential and unjustly discriminatory character, and works to the disadvantage of U.S. cities. Cliches such as "two wrongs don't make a right", as cited by one carrier, are not the answer in such circumstances.

It hardly requires mentioning that New York is the gateway through which the overwhelming bulk of air cargo traffic over the North Atlantic moves. This record reflects the fact that the New York gateway garners over 80 percent of all such air shipments. On the other side of the Atlantic, however, the bulk of this traffic is not limited to one gateway. The greater amount is generally divided between gateway cities in England, France, Italy and Germany.

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[24] See Northeast Corridor VTOL Investigation, Docket 19078, Order No. E-25779, dated October 4, 1967.

The various carrier parties attribute the preference shown for New York to the fact that most all of the requirements essential for the support of a successful transatlantic cargo operation are located there in abundance. They point to the far greater number of schedules available, the larger number of European cities being served on a direct basis, the concentration in the area of numerous forwarders and consolidators, not to mention the availability of a vast air cargo traffic potential. There is, of course, no question but that New York is a leading cargo developer and will remain an extremely lively focal point for transatlantic traffic of every type—including transatlantic cargo shipments. If the existing rate structure continues to obtain, there is also little doubt but that New York, as a monopolistic gateway for cargo to and from Europe will, with its preeminent rate advantage, continue to maintain that position—at least until it possibly disintegrates from its own weight due to congestion, delay, pilferage, customer dissatisfaction and other concommitents of excessive growth.

Relief from that possibility could readily be realized by making full use of airport facilities within what might well be termed a localized area. As noted elsewhere, the volume of air cargo traffic presently attracted to Boston, Philadelphia, Baltimore and Washington—particularly the latter two points—is not remotely in line with what might be expected from the available cargo potential and the excellent existing facilities to handle such traffic.

Evidence with respect to so-called "hinterland" traffic submitted by Baltimore and the Virginia Parties is to a large extent contained in replies received from two separate written survey questionnaires conducted by those parties. Considerable objections were interposed to the introduction of this material, mainly on the ground the questions were framed in a biased manner so as to suggest the answer sought. The large weakness in these surveys, and one which sharply limits the weight to be accorded the data, is the numbers of answers received to many of the questions were

far too few to serve as a useful measuring tool. However, an excellent cross section of testimony was received from witnesses who appeared at the hearing and who obviously were well versed in the cargo requirements of the areas in which they were interested.

These witnesses fully supported the premise that the various cities and areas embraced by this proceeding have clearly incurred economic injury as a result of the undue preference to New York and the undue prejudice to the areas they represent. These witnesses ranged from shoe wholesalers in Baltimore, a local Boston shipper, the traffic manager for a large manufacturing pharmaceutical firm in Detroit, a Chicago manufacturer of water-softening machinery, another Chicago witness involved in the distribution of electronic components, a Detroit shipper speaking in behalf of the Ford Motor Company, a Dulles area firm—a division of FMC Corp.—all of whom testified to the difficulties of their respective firms competing to international markets because of the excessive cargo rates on this side of the Atlantic. A certain amount of this testimony was received from witnesses located beyond the local urban traffic area but within the so-called "hinterland" area who gave full support to other evidence of record designed to show that the rate structure was such that hinterland shippers were, as a practical matter, compelled to ship by truck to JFK instead of by air.

From the foregoing it is reasonably clear that the complaining cities have met the burden of establishing the harm caused to their economic well-being due to the existing unfair rate structure. With the advent of more equitable treatment, comparable to that accorded New York in the matter of rate construction, these cities should unquestionably be able to participate in a volume of North Atlantic cargo traffic more commensurate with the potential volume available to them.

While much of what has been reviewed heretofore has been related with particular emphasis on Baltimore, Wash-

ington, Philadelphia and Boston, the fact has not been overlooked that the inland cities named as parties to the case, i.e., Chicago, Detroit and Cleveland, also compete in the movement of North Atlantic cargo traffic. As indicated by the Board in the several orders establishing this case, all of these cities are recognized as U.S. gateways for North Atlantic traffic. General commodity and specific commodity rates for the aforementioned interior cities are constructed by using either the New York or Montreal gateways—whichever results in the lower through rate. The trans-atlantic charge is established on this basis, while the domestic charge is assessed by an add-on, fixed for both general commodity and specific commodity rate traffic.

All three of the inland cities suffer to a measurable degree in nearly every respect from the same prejudice, preference and discrimination stemming from the present rate system as do the coastal points. There would be little gain to review these factors other than to particularly note that high add-ons have had their ill effects not only by retarding these cities from realizing their full potential as gateways for North Atlantic traffic, but they have also been instrumental in driving shippers to the use of trucking facilities for transporting merchandise to New York for transshipment on overseas air carriers, rather than routing such shipments all the way by air. [25]

The existence of preference and prejudice in the rate structure under investigation is almost self-evident by reason of the fact that a finding which holds the rate

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[25] Hoped for reductions in the add-ons for several of these cities, discussed at the IATA Singapore Conference and later tentatively agreed to at the IATA Geneva Conference, were dispelled when (as reported in the industry press—Aviation Daily, December 29, 1971), British Overseas Airways Corp., subsequently entered a lone vote in opposition to the adoption of an air cargo rate package in its entirety, which included the proposed reduced add-ons noted above. At the same time the press report also carried the observation: "Air freight open rate exists on North Atlantic."

structure to be adverse to the public interest, *ipso facto*, makes the rate unlawful, at least to the point where approval of IATA resolutions supporting the rates will not be forthcoming from the Board. Nevertheless, the question whether such preference and prejudice is "undue" deserves some comment. As the Bureau points out, a number of factors may be considered in determining this issue, including whether competition from other modes of transportation justifies a rate differential as well as considerations relating to costs, distance, character of transportation, and advantages of location. The Bureau properly dismisses as not a significant factor, competition from waterborne traffic.

As far as cost differentials, as related to transport costs, are concerned, it may be noted that during the course of the hearing the Bureau requested an agreement among the carrier parties whereby it would be understood that direct aircraft operating costs for comparable equipment are proportionate to miles flown. The only party opposing this suggested agreement was TWA, which maintained then, as now, that some degree of payload weight will be sacrificed in order to fly longer distances, and even though costs do taper as the length of haul increases, the decline in cost is more than offset by sacrificed payload. The carrier also referred to such additional reasons as airport elevation, runway length, etc. On this basis, TWA reached a conclusion that it would cost 42 percent more for it to operate out of Baltimore than out of New York with respect to transatlantic unit flying costs, due to runway conditions and the increased stage length.

The Bureau properly rejects the above costing theory for the well stated reason that it requires a presumption that prior to any possible payload penalty, the aircraft will be operating at a 100 percent capacity. Aside from the fact that normal freight load factors at the cities in-

volved will scarcely reach the 100 percent level in the immediate future, and even if such an eventuality actually came to pass, the sacrifice of payload involving about a 200-mile disparity would hardly be significant enough to remotely justify a 42 percent cost differential.

The *Solution.* From the foregoing it will be readily seen that the "special justification" mentioned by the Board in the second *Hawaiian Common Fares* case, *supra,* as a basic consideration in giving its approval in that investigation to a situation involving common fares, is abundantly present in this investigation involving a commonrate situation. A finding herein that certain of the cities involved should be commonrated with New York will not in any manner upset or dampen the effects of the Board's findings in *Hawaiian Common Fares.*

The evidence clearly supports the finding that the North Atlantic cargo rate structure is unduly preferential and prejudicial and that the Board may, in accordance with Section 1002(f) of the Act, alter the rate structure so as to correct the said preference and prejudice and by order require the air carriers and foreign air carriers to discontinue charging such preferential and prejudicial rates. In light of the fact that the part of the 1969 Athens agreement involving the North Atlantic rate structure and which embodies the said preference and prejudice, is adverse to the public interest and in violation of the Act, the Board must disapprove such agreements pursuant to Section 412(b) of the Act. The next question relates to the best method available to establish, in lieu of the existing unlawful rate structure, an equitable system of ratemaking which will not be adverse to the public interest, or in violation of the Act.

As noted earlier, New York generally prefers that air cargo rates for the North Atlantic be based on the shortest operated mileage in the markets at issue. While this solution has some merit, it would not provide a complete

remedy for the problem. In this connection it may be observed that although New York supports the mileage concept for ratemaking purposes in U.S.-Europe markets, where it has a slight advantage, it apparently agrees with the commonrate principle in the construction of cargo rates between New York and Baltimore/Washington, on the one hand, and markets in the Far East and South America, on the other hand, where the mileage advantage favors Baltimore/Washington, if not by too great a margin. With the exception of a few instances where at certain weightbreaks shipments out of JFK incur a one cent per pound differential over Baltimore/Washington, the several points are commonrated in the matter of cargo shipments to and from such Far East points as Singapore, Manila, Tokyo, Bankok, Sydney, etc., as well as with respect to points in South America such as Montevideo, Brasilia, La Paz, Maracaibo, etc. In passing it may also be noted in this connection that IATA has equalized rates between the U.S. west coast and the Far East notwithstanding, for example, a difference of some 685 miles between Tokyo and Seattle compared with Tokyo and Los Angeles.

Boston advocates a restructuring of the rates to one based on mileage so as to enjoy the advantage of having the shorter mileage in the shipment of cargo to Europe. On the other hand, Philadelphia, Baltimore and Washington (the Virginia Parties), all seek to have cargo charges between those points and Europe commonrated with New York. Chicago, Detroit and Cleveland request that the present rate structure be changed to one predicated on a strict mileage concept.

The Bureau mentions three separate ways in which a more equitable rate structure may be brought about, that is: (a) the application of published arbitraries to the competing municipalities; (b) the application of a true mileage (IATA mileage manual) concept in determining the rate structure; and (c) the mileage approach with

respect to Chicago, Cleveland, Detroit and Philadelphia combined with the application of a commonrate to Baltimore, Boston and Washington. From a practical vantage point the Bureau finds the arbitrary approach as the most attractive but one that does not effect a truly equitable rate structure. It suggests that the mileage approach is the most attractive of its three proposals when viewed from an overall vantage point.

In connection with the Bureau's position in this respect, there is attached hereto for informational purposes, as Appendix C, a reproduction of a series of tables which are to a large extent self-explanatory. It is sufficient to say that the tables reflect current international rates and charges with respect to general commodity rates and specific commodity rates in various markets, together with the IATA mileages involved. Also shown are general commodity rate arbitraries and specific commodity rate add-ons compared to those based on the mileage method and those advocated by Pan American at recent IATA rate conferences.

Upon consideration of all of the evidence, as supplemented by arguments in support and those in opposition, with respect to the most feasible and proper approach to the installation of an equitable air cargo rate system which will meet the future, as well as the present service equiremnts of the cities concerned, it has been determined that the northeast city cluster comprising the airports serving Washington, northern Virginia, Baltimore, Philadelphia and Boston should be commonrated with New York. This action is necessary if the new rate system is to reap the total benefits anticipated by the replacement of a system which is not only inequitable and unlawful, but which is also outmoded when measured by factors related to the public interest. All of the latter matters have been explored in some detail earlier and repetition at this time is unnecessary.

Suffice it to say that commonrating the above points will serve to assist the cities in question in attracting and competing for air cargo traffic on a fairly even basis with New York. The fact that in some instances a few of those cities may have a slight mileage advantage over New York will not in any discernable way work to the detriment of New York's position as one of the world's leading air transport centers. Certainly, whatever incidental effects may be felt by that point will not remotely compare with those resulting from a continuation of the existing discriminatory practices which, for all practical purposes, forecloses the complaining cities from enjoying their rightful share of this traffic.

Similarly, the interior cities will, under the mileage concept, be in position to enjoy cargo rates pegged with due regard to the mileage flown and will also be in position to enjoy their full share of air cargo traffic without the necessity of relinquishing a portion of that business to surface carriers by reason of the unnecessarily high air rates. While all of the foregoing benefits are noted as city benefits, the fact of the matter is such benefits in actuality flow directly to the shippers and consignees who, in the final analysis, will enjoy a more beneficial position with respect to competition with overseas competitors. Of course, the last but not the least of the benefits flowing from the installation of a rate system that combines the beneficial aspects through commonrating the coastal cities with the application of a mileage concept in the establishment of rates involving interior cities, is the provident effect the availability of other airports will have on congested conditions involving New York's air facilities.

All other matters of record upon which specific findings and conclusions have not been set out in detail, have nevertheless been fully considered and it is also found and concluded that further consideration would in no substantial way affect or cause any change to be made in the ultimate findings and conclusions as set forth herein.

SUMMARY OF FINDINGS AND CONCLUSIONS

In view of the foregoing and all the evidence of record, together with those factors relating to the comparative public interest, as well as all other matters which may be officially noticed, it is found:

1. That the part of an agreement adopted at the traffic conferences of the International Air Transport Association, at meetings held in Athens in April and May, 1969, embodying the North Atlantic cargo rate structure the subject of which is contained in Agreement CAB 21046, tentatively approved by the Board in Order 69-8-174 dated August 29, 1969, to be effective for a two-year period beginning October 1, 1969—is unduly and unreasonably preferential to New York and unduly prejudicial and unjustly discriminatory to Baltimore, Washington, Philadelphia, Boston, Detroit, Cleveland and Chicago.

2. That the system of constructing the said rates involving the above-named cities, other than New York, results in cargo rates which are adverse to the public interest and in violation of the Act and unlawful.

3. That the Board should reconsider its approval of Agreement CAB 21046, if the said Agreement remains in force and effective, and on reconsideration it should condition its approval of the IATA resolutions applicable to North Atlantic cargo rates so as to require (a) that Boston, Philadelphia, Baltimore and Washington be commonrated with New York in the matter of general commodity rates, specific commodity rates, and container rates; and (b) the elimination of add-ons between Detroit, Chicago and Cleveland, on the one hand, and New York on the other hand, for general commodity rates, specific commodity rates and container rates, and in place thereof adopt a per mile rate for the segment between each of the said cities on the one hand, and New York City, on the other hand, the per mile rate for the domestic portion of

the transportation to be ascertained from the per mile trans-atlantic rate between New York and London, as shown in the current IATA mileage manual.

4. That the minimum charge of $25 per kilogram at each of the above cities—other than New York—be reduced to $22 per kilogram, thus eliminating the $3 add-on and bringing the minimum charge in line with that established for New York.

5. That, in the event the IATA agreement, as tentatively approved by the Board in Agreement CAB 21046, is no longer effective, and is not reactivated by additions, deletions, or otherwise amended for renewed approval, the Board should place those air carriers authorized to operate air cargo service over the North Atlantic on notice that full compliance with the findings contained herein shall be expected should new cargo rates for the North Atlantic route be introduced, whether such rates are the subject of a new IATA agreement, or whether such rates are proposed by one or more individual air carriers.

6. That the investigation in this proceeding instituted purusant to Order 69-3-47, dated March 13, 1969, be and it hereby is terminated.

An appropriate order is attached.

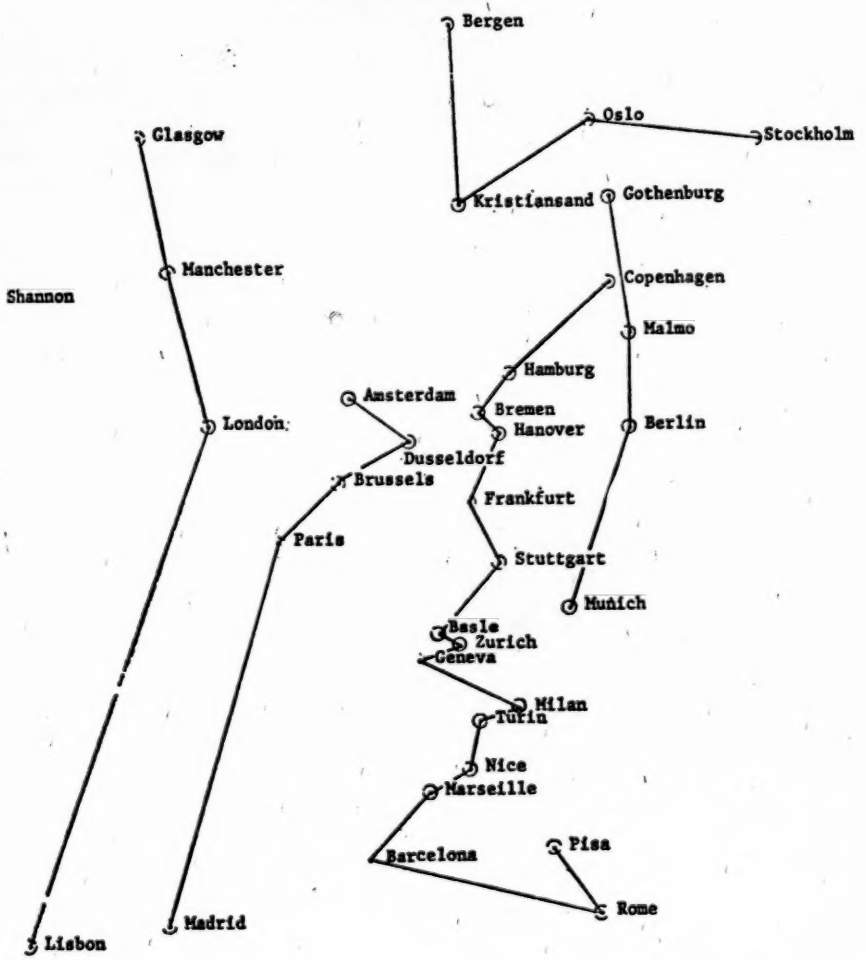
/s/ WILLIAM F. CUSICK
William F. Cusick
Hearing Examiner

Attachments

APPENDIX A

European Cities Common Rated By IATA
General Commodity Tariffs Are Not Concentrated In
Definitive Mileage Zones And Differ With Weight Breaks

IATA GCR - 220 Lbs.



GENERAL COMMODITY CHARGES IN CENTS PER POUND

From	To	Miles	Under 100 lbs	Disadvantage To Washington (Dulles)	100 lbs	Disadvantage To Washington (Dulles)	220 lbs	Disadvantage To Washington (Dulles)	440 lbs	Disadvantage To Washington (Dulles)	660 lbs	Disadvantage To Washington (Dulles)	1100 lbs	Disadvantage To Washington (Dulles)
Washington (Dulles)	London	3,631	--	--	--	--	67	01	51	01	44	01	38	02
New York	Dusseldorf	3,738	--	--	--	--	66		50		43		36	
Washington	Munich	4,267	150	09	112	06	71	05	55	03	48	04	41	03
New York	Rome	4,280	141		106		67		52		44		38	
Washington	Bremen	4,002	--	--	--	--	70	02	54	02	47	02	40	02
New York	Munich	4,030	--	--	--	--	68		52		45		38	
Washington	Oslo	3,896	146	06	109	04	72	03	55	01	49	03	42	03
New York	Stockholm	3,909	140		105		69		54		46		39	
Washington	Frankfurt	4,074	144	03	108	02	69	02	54	02	47	03	40	02
New York	Rome	4,280	141		106		67		52		44		38	
Washington	Glasgow	3,435	127	06	97	04	67	03	51	02	44	02	38	03
New York	London	3,456	121		93		64		49		42		35	

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APPENDIX B

APPENDIX C
Page 1 of 9

A Comparison of Various North Atlantic Arbitrary (Add-On) Rate Proposals

Rates in U.S. Dollars per Kilogram

Market	IATA Mileage	Minimum Charge	Current International Rates and Charges: Under 45	45	100	200	300	500	1,000
A. General Commodity Rates									
New York - Frankfurt	3851	$22.00	$ 3.04	$ 2.28	$ 1.47	$1.13	$ .97	$ .82	-
New York - London	3456	22.00	2.67	2.04	1.41	1.07	.92	.78	-
New York - Paris	3628	22.00	2.85	2.16	1.45	1.11	.95	.80	-
New York - Rome	4280	22.00	3.11	2.33	1.48	1.14	.98	.83	-
New York - Tel Aviv	5689	18.00 1/	3.72	2.79	2.13	1.86	1.75	1.60	-
B. A Sample of 2/ Specific Commodity Rates	Commodity Description Number								
New York to Frankfurt	8550	-	-	.90	-		.79		.73
Frankfurt to New York	4702	-	-	.96	.80	.70	-	.65	.60
New York to London	2196	-	-	.79	-	-	-	.64	-
London to New York	4109	-	-	.92	.76	.66	-	.61	.56
New York to Paris	4316	-	-	1.16	-	.86	-	.66	.56
New York to Rome	4318	-	-	1.19	.81	.59	-	-	-
New York to Tel Aviv	4702	-	-	1.66	1.50	1.40	-	1.33	-

1/ Applicable westbound the minimum charge is $17.00. SOURCE: I.A.T.T.C. C.A.B. 193.

2/ The impact of the various arbitrary proposals is measured against this group of specific commodity rates. Dashes (-) and/or blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.

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APPENDIX C

General Commodity Rate Arbitraries
Current Arbitraries Compared to Those Proposed Based on the Mileage Differential 4/

Market	Percentage: IATA Mileage Over NYC	Percentage: Min. Charge Over NYC	Rates in U. S. cents per Kilogram: Under 45	45	100	Eastbound 200	Westbound 200	300	500
Current Baltimore (arbitrary)		$25.00 2/	13.0	9.0	6.0	6.0	6.0	6.0	6.0
Proposed BAL - FRA	104.6	22.00	14.0	10.5	6.8	5.2	5.2	4.5	3.8
% Change		-12.0	7.7	16.7	13.3	- 13.3	- 13.3	- 25.0	- 36.7
BAL - LON	105.2	22.00	13.9	10.6	7.3	5.6	5.6	4.8	4.1
% Change		-12.0	6.9	17.8	21.7	- 6.7	- 6.7	- 20.0	- 31.7
BAL - PAR	104.9	22.00	14.0	10.6	7.1	5.4	5.4	4.7	3.9
% Change		-12.0	7.7	17.8	18.3	- 10.0	- 10.0	- 21.7	- 35.0
BAL - ROM	104.2	22.00	13.1	9.8	6.2	4.8	4.8	4.1	3.5
% Change		-12.0	0.8	8.9	3.3	- 20.0	- 20.0	- 31.7	- 41.7
BAL - TEL	103.2	18.00EB 17.00WB	11.9	8.9	6.8	6.0	6.0	5.6	5.1
% Change		-14.3 -15.0	8.5	- 1.1	13.0	--0-	-0-	- 6.7	- 15.0
Current Boston (arbitrary)		$22.00 3/	- 4.0	- 3.0	- 2.0	- 1.0	- 1.0	- 1.0	- 1.0
Proposed BOS - FRA	95.0	22.00	- 15.2	- 11.4	- 7.4	- 5.6	- 5.6	- 4.8	- 4.1
% Change 1/		-	280.0	280.0	270.0	460.0	460.0	380.0	310.0
BOS - LON	94.5	22.00	- 14.7	- 11.2	- 7.8	- 5.9	- 5.9	- 5.1	- 4.3
% Change 1/		-	267.5	273.3	290.0	490.0	490.0	410.0	330.0
BOS - PAR	94.7	22.00	- 15.1	- 11.4	- 7.7	- 5.9	- 5.9	- 5.0	- 4.2
% Change 1/		-	277.5	280.0	285.0	490.0	490.0	400.0	320.0
BOS - ROM	96.4	22.00	- 11.2	- 8.4	- 5.3	- 4.1	- 4.1	- 3.5	- 3.0
% Change 1/		-	180.0	180.0	165.0	310.0	310.0	250.0	200.0
BOS - TEL	97.3	18.00EB 17.00WB	- 10.0	- 7.5	- 5.8	- 5.0	- 5.0	- 4.7	- 4.3
% Change 1/		-0- -0-	150.0	150.0	190.0	400.0	400.0	370.0	330.0

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1/ For Boston the percentage increases reflect an increase in the negative arbitraries, i.e., a substantial rate improvement.

2/ Not applicable between BAL and TEL. In that market the current minimum charge is $21.00 eastbound and $20.00 westbound.

3/ Not applicable between BOS and TEL. In that market the current minimum charge is $18.00 eastbound and $17.00 westbound.

4/ A sample calculation of the proposed rate add-on for BAL at the 500 kilogram level follows. The current NYC-FRA rate of $0.82 per kilogram is multiplied by the percentage amount the IATA BAL-FRA mileage exceeds the IATA NYC-FRA mileage (4.6%). Thus the proposed add-on is 3.8 cents (82 x 4.6 = 3.8)

General Commodity Rate Arbitraries
Current Arbitraries Compared to Those Proposed Based on the Mileage Differential

Market	Percentage: IATA Mileage Over NYC	Percentage: Minimum Charge Over NYC	Rates in U. S. cents per Kilogram: Under 45	45	100	Eastbound 200	Westbound 200	300	500
Current Chicago (arbitrary)		$ 25.00 1/	19.9	17.2	18.5	13.5	19.5	14.8	14.8
Proposed 3/ CHI - FRA	112.5	22.00	38.0	28.5	18.4	14.1	14.1	12.1	10.2
% Change		-12.0	91.0	65.7	- 0.5	4.4	-27.7	-18.2	-31.1
CHI - LON	114.4	22.0	38.4	29.3	20.3	15.4	15.4	13.2	11.2
% Change		-12.0	93.0	70.3	9.7	14.1	-21.0	-10.8	-24.3
CHI - PAR	114.7	22.00	41.9	31.8	21.3	16.3	16.3	14.0	11.8
% Change		-12.0	110.6	84.9	15.1	20.7	-16.4	- 5.4	-20.3
CHI - ROM	113.2	22.00	41.1	30.8	19.5	15.0	15.0	12.9	11.0
% Change		-12.0	106.5	79.1	5.4	11.1	-23.1	-12.8	-25.7
CHI - TEL	108.6	18.00EB 17.00WB	32.0	24.0	16.3	16.0	16.0	15.0	13.8
% Change		-14.3 -15.0	60.8	39.5	- 1.1	18.5	-17.9	1.4	- 6.8
Current Cleveland (arbitrary)		$ 25.00 2/	13.0	11.6	13.2	8.6	14.2	13.8	11.5
Proposed CLE - FRA	107.4	22.00	22.5	16.9	10.9	8.4	8.4	7.2	6.1
% Change		-12.0	73.1	45.7	-17.4	2.3	-40.8	-47.8	-47.0
CLE - LON	108.5	22.00	22 7	17.3	12.0	9.1	9.1	7.8	6.6
% Change		-12.0	74.6	49.1	- 9.1	5.8	-35.9	-43.5	-42.6
CLE - PAR	108.7	22.00	24.8	18.8	12.6	9.7	9.7	8.3	7.0
% Change		-12.0	90.8	62.1	- 4 5	12.8	-31.7	-39.9	-39.1
CLE - ROM	107.6	22.00	23.6	17.7	11:2	8.7	8.7	7.4	6.3
% Change		-12.0	81.5	52.6	-15.2	1.2	-38.7	-46.4	-45.2
CLE - TEL	105.7	18.00EB 17.00WB	21.2	15.9	12.1	10.6	10.6	10.0	9.1
% Change		-14.3 -15.0	63.1	37.1	- 8.3	23.3	-25.4	-27.5	-20.9

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1/ Not applicable between CHI and TEL. In that market the current minimum charge is $21.00 eastbound and $20.00 westbound.
2/ Not applicable between CLE and TEL. In that market the current minimum charge is $21.00 eastbound and $20.00 westbound.
3/ See footnote No. 4, page 2 for sample calculation.

General Commodity Rate Arbitraries

Current Arbitraries Compared to Those Proposed Based on the Mileage Differential

Market		Percentage IATA Mileage Over NYC	Percentage Minimum Charge Over NYC	Rates in U. S. cents per Kilogram: Under 45	45	100	Eastbound 200	Westbound 200	300	500
Current Dulles (arbitrary)			$ 25.00 1/	15.0	9.0	6.0	6.0	6.0	6.0	6.0
Proposed 3/	IAD - FRA	105.3	22.00	16.1	12.1	7.8	6.0	6.0	5.1	4.3
	% Change		-12.0	23.8	34.4	30.0	-	-	-15.0	-28.3
	IAD - LON	105.8	22.00	15.5	11.8	8.2	6.2	6.2	5.3	4.5
	% Change		-12.0	19.2	31.1	36.7	3.3	3.3	-11.7	-25.0
	IAD - PAR	105.6	22.00	16.0	12.1	8.1	6.2	6.2	5.3	4.5
	% Change		-12.0	23.1	34.4	35.0	3.3	3.3	-11.7	-25.0
	IAD - ROM	104.7	22.00	14.6	11.1	7.0	5.4	5.4	4.6	3.9
	% Change		-12.0	12.3	22.2	16.7	-10.0	-10.0	-23.3	-35.0
	IAD - TEL	103.6	18.00EB 17.00WB	13.4	10.0	7.7	6.7	6.7	6.3	5.8
	% Change		-14.3 -15.0	3.1	11.1	28.3	11.7	11.7	5.0	- 3.3
Current Philadelphia (arbitrary)			$ 25.00 2/	7.0	5.0	3.0	3.0	3.0	3.0	3.0
Proposed	PHL - FRA	102.3	22.00	7.0	5.2	3.4	2.6	2.6	2.2	1.9
	% Change		-12.0	-	4.0	13.3	-13.3	-13.3	-26.7	-36.7
	PHL - LON	102.5	22.00	6.7	5.1	3.5	2.7	2.7	2.3	2.0
	% Change		-12.0	- 4.3	2.0	16.7	-10.0	-10.0	-23.3	-33.3
	PHL - PAR	102.4	22.00	6.8	5.2	3.5	2.7	2.7	2.3	1.9
	% Change		-12.0	- 2.9	4.0	16.7	-10.0	-10.0	-23.3	-36.7
	PHL - ROM	102.1	22.00	6.5	4.9	3.1	2.4	2.4	2.1	1.7
	% Change		-12.0	- 7.1	- 2.0	3.3	-20.0	-20.0	-30.0	-43.3
	PHL - TEL	101.5	18.00EB 17.00WB	5.6	4.2	3.2	2.8	2.8	2.6	2.4
	% Change		-14.3 -15.0	-20.0	-16.0	6.7	- 6.7	- 6.7	-13.3	-20.0

1/ Not applicable between IAD and TEL. In that market the current minimum charge is $21.00 eastbound and $20.00 westbound.
2/ Not applicable between PHL and TEL. In that market the current minimum charge is $21.00 eastbound and $20.00 westbound.
3/ See footnote No. 4, page 2 for sample calculation.

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Specific Commodity Rate Add-ons

Currently Published Specific Arbitraries Compared to Proposed Mileage Method and PAA 1/

Market		Percentage IATA Mileage Over NYC	Commodity Description Number	Rates in U. S. cents per Kilogram 2/: 45	100	200	300	500	1,000
Current Baltimore (arbitrary)				9.0	6.0	6.0	6.0	6.0	6.0
Proposed 3/	BAL to FRA	104.6	8550	4.1			3.6		3.4
	% Change			-54.4			-40.0		-43.3
	FRA to BAL	104.6	4702	4.4	3.7	3.2		3.0	2.8
	% Change			-51.1	-38.3	-46.7		-50.0	-53.3
	BAL to LON	105.2	2196	4.1				3.3	
	% Change			-54.4				-45.0	
	LON to BAL	105.2	4109	4.8	4.0	3.4		3.2	2.9
	% Change			-46.7	-33.3	-43.3		-46.7	-51.7
	BAL to PAR	104.9	4316	5.7		4.2		3.3	2.7
	% Change			-36.7		-30.0		-46.7	-55.0
	BAL to ROM	104.2	4318	5.0	3.4	2.5			
	% Change			-44.4	-56.7	-58.3			
	BAL to TEL	103.2	4702	5.3	4.8	4.5		4.3	
	% Change			-41.1	-20.0	-25.0		-28.3	
Pan American arbitraries 1/			All	8.0	5.0	5.0	5.0	4.0	4.0
	% Change			-11.1	-16.7	-16.7	-16.7	-33.3	-33.3

1/ Pan American exhibit PA-104.
2/ Blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.
3/ See footnote No. 4, page 2 for sample calculation.

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Specific Commodity Rate Add-ons

Currently Published Specific Arbitraries Compared to Proposed Mileage Method and PAA[1]

Market	Percentage IATA Mileage Over NYC	Commodity Description Number	Rates in U. S. cents per Kilogram [2] 45	100	200	300	500	1,000
Current Boston (arbitrary)			-0-	-0-	-0-	-0-	-0-	-0-
Proposed [3] BOS to FRA	95.0	8550	-4.5			-4.0		-3.6
% Change								
FRA to BOS	95.0	4702	-4.8	-4.0	-3.5		-3.2	-3.0
% Change								
BOS to LON	94.5	2196	-4.3				-3.5	
% Change								
LON to BOS	94.5	4109	-5.1	-4.2	-3.6		-3.4	-3.1
% Change								
BOS to PAR	94.7	4316	-6.1		-4.6		-3.5	-3.0
% Change								
BOS to ROM	96.4	4318	-4.3	-2.9	-2.1			
% Change								
BOS to TEL	97.3	4702	-4.5	-4.0	-3.8		-3.6	
% Change								
Pan American arbitraries [1]		All	-0-	-0-	-0-	-0-	-0-	-0-
% Change				No Change				

1/ Pan American exhibit PA-104.
2/ Blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.
3/ See footnote No. 4, page 2 for sample calculation.

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Specific Commodity Rate Add-Ons

Current Domestic General Commodity Rate[1] or Specific Arbitraries Compared to Proposed Mileage Method and PAA[2]

Market	Percentage IATA Mileage over NYC	Commodity Description Number	Rates in U. S. cents per Kilogram [3] 45	100	200	300	500	1,000
Current Chicago (Add-On) [1]			26.2	26.2	26.2	26.2	24.0	22.7
Proposed [4] CHI to FRA	112.5	8550	11.2			9.9		9.1
% Change			-57.3			-62.2		-59.9
FRA to CHI	112.5	4702	12.0	10.0	8.8		8.1	7.5
% Change			-54.2	-61.8	-66.4		-66.2	-67.0
CHI to LON	114.4	2196	11.4				9.2	
% Change			-56.5				-61.7	
LON to CHI	114.4	4106	13.2	10.9	9.5		8.8	8.1
% Change			-49.6	-58.4	-63.7		-63.3	-64.3
CHI to PAR	114.7	4316	17.1		12.6		9.7	8.2
% Change			-34.7		-51.9		-59.6	-63.9
CHI to ROM	113.2	4318	15.7	10.7	7.8			
% Change			-40.1	-59.2	-70.2			
CHI to TEL	108.6	4702	14.3	12.9	12.0		11.6	
% Change			-45.4	-50.8	-54.2		-51.7	
Pan American Arbitraries [2]		All	18.0	17.0	16.0	15.0	13.0	12.0
% Change			-31.3	-35.1	-38.9	-42.7	-45.8	-47.1

1/ Due to a lack of applicable domestic specific commodity rates or published arbitraries in markets involved, general rates apply. This is also the case with respect to Cleveland and Detroit as well as all other interior U.S. cities not included in this Appendix.
2/ Pan American Exhibit PA-104.
3/ Blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.
4/ See footnote No. 4, page 2 for sample calculation.

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Specific Commodity Rate Add-Ons

Currently Published Specific Arbitraries Compared to Proposed Mileage Method and PAA[1]

Market	Percentage IATA Mileage over NYC	Commodity Description Number	Rates in U. S. cents per Kilogram [2]					
			45	100	200	300	500	1,000
Current Philadelphia (arbitrary)			5.0	3.0	3.0	3.0	3.0	3.0
Proposed [3] PHL to FRA	102.3	8550	2.1			1.8		1.7
% Change			-58.0			-40.0		-43.3
FRA to PHL	102.3	4702	2.2	1.8	1.6		1.5	1.4
% Change			-56.0	-40.0	-46.7		-50.0	-53.3
PHL to LON	102.5	2196	2.0				1.6	
% Change			-60.0				-68.0	
LON to PHL	102.5	4109	2.3	1.9	1.6		1.5	1.4
% Change			-54.0	-36.7	-46.7		-50.0	-53.3
PHL to PAR	102.4	4316	2.8		2.1		1.6	1.3
% Change			-44.0		-30.0		-46.7	-56.7
PHL to ROM	102.1	4318	2.5	1.7	1.2			
% Change			-50.0	-43.3	-60.0			
PHL to TEL	101.5	4702	2.5	2.2	2.1		2.0	
% Change			-50.0	-26.7	-30.0		-33.3	
Pan American arbitraries[1]			4.0	2.0	2.0	2.0	2.0	2.0
% Change			-20.0	-33.3	-33.3	-33.3	-33.3	-33.3

1/ Pan American Exhibit PA-124.
2/ Blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.
3/ See footnote No. 4, page 2 for sample calculation.

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Specific Commodity Rate Add-Ons

Currently Published Specific Arbitraries Compared to Proposed Mileage Method and PAA[1]

Market	Percentage IATA Mileage over NYC	Commodity Description Number	Rates in U. S. cents per Kilogram [2]					
			45	100	200	300	500	1,000
Current Dulles (arbitrary)			9.0	6.0	6.0	6.0	6.0	6.0
Proposed [3] IAD to FRA	125.3	8550	4.8			4.2		3.9
% Change			-46.7			-30.0		-35.0
FRA to IAD	125.3	4702	5.1	4.2	3.7		3.4	3.2
% Change			-43.3	-30.0	-38.3		-43.3	-46.7
IAD to LON	125.8	2196	4.6				3.7	
% Change			-48.9				-38.3	
LON to IAD	125.8	4109	5.3	4.4	3.8		3.5	3.2
% Change			-41.1	-26.7	-36.7		-41.7	-46.7
IAD to PAR	125.6	4316	6.5		4.8		3.7	3.1
% Change			-27.8		-20.0		-38.3	-48.3
IAD to ROM	104.7	4318	5.6	3.8	2.8			
% Change			-37.8	-36.7	-53.3			
IAD to TEL	123.6	4702	6.0	5.4	5.0		4.9	
% Change			-33.3	-10.0	-16.7		-18.3	
Pan American arbitraries[1]			8.0	5.0	5.0	5.0	4.0	4.0
% Change			-11.1	-16.7	-16.7	-16.7	-33.3	-33.3

1/ Pan American Exhibit PA-124.
2/ Blank spaces at certain weight breaks indicate no published rates. The next lower weight break rate and add-on apply.
3/ See footnote No. 4, page 2 for sample calculation.

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C

Issued under delegated authority

Docket 20522

AGREEMENTS ADOPTED BY IATA RELATING TO NORTH ATLANTIC CARGO RATES

ORDER

A full public hearing having been held in the above-entitled proceeding and the Examiner, upon consideration of the record, having issued an Initial Decision containing his findings and conclusions, pursuant to the authority delegated to Hearing Examiners under Rule 27 of the Rules of Practice in Economic Proceedings, which Initial Decision is attached hereto and made a part hereof;

IT IS ORDERED:

1. That approval of Agreement CAB 21046 is hereby reconsidered and on reconsideration approval of the IATA resolutions is hereby conditioned on the following: (a) that Boston, Philadelphia, Baltimore and Washington be commonrated with New York in the matter of general commodity rates, specific commodity rates, and container rates; and (b) the elimination of add-ons between Detroit, Chicago and Cleveland, on the one hand, and New York on the other hand, for general commodity rates, specific commodity rates and container rates, and in place thereof the adoption of a per mile rate for the segment between each of the said cities on the one hand, and New York City, on the other hand, the per mile rate for the domestic portion of the transportation to be ascertained from the per mile transatlantic rate between New York and London, as shown in the current IATA mileage manual.

2. That the minimum cargo charge of $25 per kilogram at each of the above cities, other than New York, be reduced to $22 per kilogram.

3. That the investigation herein be and it hereby is terminated.

4. That this order shall become effective as the final order of the Board on the 31st day after the date of service of this order and the Initial Decision attached hereto unless a petition for discretionary review is filed within 21 days after service hereof in accordance with Rule 28 of the Rules of Practice in Economic Proceedings (14 CFR 302.28) or the Board issues an order to review upon its own initiative. If a petition for discretionary review is timely filed, or if action for review is taken by the Board upon its own initiative, the effectiveness of this order shall be stayed until further order of the Board.

/s/ WILLIAM F. CUSICK
William F. Cusick
Hearing Examiner

Decision dated February 6, 1973 (Order 73-2-24)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

DOCKET 20522

AGREEMENTS ADOPTED BY IATA RELATING TO NORTH ATLANTIC CARGO RATES

Decided: February 6, 1973

FOUND THAT:

1. The North Atlantic cargo rate structure, including general commodity rates, specific commodity rates, container rates and minimum charges, maintained pursuant to agreement by the IATA member carriers, is unduly and unreasonably preferential to New York, and unduly and unreasonably prejudicial to Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago.

2. Agreement CAB 22969, approved by the Board in Order 72-6-137, dated June 29, 1972, is adverse to the public interest, in violation of the Act, and unlawful, to the extent it embodies rates and charges found unlawful herein.

3. The lawful North Atlantic general commodity, and container rates for service between the cities of Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago, on the one hand, and points in Europe, on the other hand, is the New York-European rate per mile multiplied by the distance in miles between such cities and points in Europe. The mileage to be used in determining the lawful rates is the shortest operated point-to-point mileage.

4. The record does not afford an adequate basis for determining the lawful relationship between the minimum charges applicable at the various gateway cities party to

this proceeding. Any proposal embodying differentials in the minimum charges between any of the gateway cities shall be accompanied by adequate cost justification.

5. The lawful cargo rates between Memphis and other non-gateway cities, on the one hand, and points in Europe, on the other hand, are beyond the scope of this proceeding.

6. The question of the lawful relationship between rates and charges at non-gateway interior cities and rates and charges at gateway points will be considered in determining the lawfulness of the new agreements and tariffs required to be filed herein.

APPEARANCES:

Same as in the Administrative Law Judge's initial decision and in addition, the following:

Allan I. Mendelson, for Alitalia Airlines.

William A. Kutzke, for the Department of Transportation.

Herbert Smolen, for the Philadelphia Parties.

Robert L. Hankin, for the Chicago Parties.

OPINION

BY THE BOARD:

This proceeding is an investigation of the relationship of the North Atlantic air cargo rates between European points and New York, *vis-a-vis* the rates between such European points and Baltimore, Washington, Philadelphia, Boston, Cleveland, Detroit, and Chicago.[1] The principal

[1] The Board instituted this investigation by Order 69-3-47, March 13, 1969, in response to a complaint filed jointly by the Mayor and City Council of Baltimore, the Chamber of Commerce of Baltimore, the Baltimore Customhouse Brokers and Forwarders Association, Air Freight International, Inc., and John S. Connor, Inc., (hereinafter the Baltimore parties). The complaint alleged that the trans-

issue is whether the freight rate structure on the North Atlantic unduly prefers New York and unduly prejudices the other named municipalities in violation of section 404 (b) of the Federal Aviation Act of 1958. The investigation also includes the issue whether any resolutions of the International Air Transport Association (IATA), pursuant to which the subject rates are established, are adverse to the public interest or in violation of the Act, requiring their disapproval pursuant to section 412(b) of the Act. The parties to this investigation include all IATA air carriers and foreign air carriers who provide air cargo service over the North Atlantic, whether by direct single-carrier service, or through participation in through service pursuant to joint rates. United States carriers participating in such through service only on domestic segments were also made parties.[2]

After an evidentiary hearing, Administrative Law Judge William F. Cusick issued his initial decision in which he

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Atlantic air cargo rate structure unduly prejudiced Baltimore and unduly preferred New York/Boston. The investigation was expanded at the request of the Virginia Airports Authority, representing the Commonwealth of Virginia, and the Fairfax County Industrial Authority (hereinafter the Virginia parties), to include the rates to and from Washington, D.C. as served through Dulles International Airport. The Board specifically excluded from the investigation the issue of the lawfulness of the general rate level (except to the extent that the level bears upon the discrimination issue), as well as the relationship of rates as among the different weight breaks between the same points.

The scope of the proceeding was expanded to include the rates applicable at Boston, Philadelphia, Detroit, Chicago, and Cleveland by Order 69-4-139, April 30, 1969, and Order 69-10-111, October 23, 1969.

[2] During the course of the proceeding, intervention was granted to the Department of Transportation (DOT), the Port of New York Authority (Port Authority), and the City and Chamber of Commerce of Memphis, Tennessee (Memphis parties). Orders 70-12-91, December 15, 1970; 71-4-55, April 9, 1971; and 71-4-171, April 27, 1971, respectively.

found that the North Atlantic cargo rate structure is unduly preferential to New York, and unduly prejudicial to Baltimore, Washington, Philadelphia, Boston, Detroit, Chicago, and Cleveland; that the agreements adopted by IATA in April and May of 1969, embodying the cargo rate structure, contained in CAB agreement 21046, approved by the Board in Order 69-10-30, October 7, 1969, are adverse to the public interest; that the minimum charge at each of the affected cities should be reduced from $25 to $22 (the charge at New York); and that the public interest requires that for the future the cities of New York, Boston, Philadelphia, Baltimore, and Washington, D.C. be common-rated for the purpose of North Atlantic cargo rates, and that the cargo rates for the segments between New York and the cities of Detroit, Chicago, and Cleveland be based upon the mileage between those cities and New York, at the New York-London rate per mile.

By Order 72-2-87,[3] the Board on its own motion ordered a review of the initial decision. Exceptions to the initial decision,[4] briefs and reply briefs[5] have been filed, oral

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[3] February 25, 1972.

[4] Exceptions to the initial decision were filed by Alitalia Airlines, British Overseas Airways Corporation, KLM Royal Dutch Airlines, Sabena Belgian World Airlines, the Boston Civic Parties, the Chicago Civic Parties, the Detroit Civic Parties, the Port Authority, Pan American, Seaboard World Airlines (hereinafter Seaboard), TWA, and the Board's Bureau of Economics (hereinafter the Bureau).

[5] Briefs were filed by the Boston parties, the Philadelphia parties, the Memphis intervenors, the Port Authority, Pan American, Seaboard, TWA, the Bureau, and the Department of Transportation. The Baltimore parties, the Chicago parties, the Detroit parties, the Metropolitan Washington Board of Trade, and the Virginia parties, adopted their briefs to the examiner as their briefs to the Board. Reply briefs have been filed by the Baltimore parties, the Metropolitan Washington Board of Trade, the Detroit parties, the Virginia parties, and by Pan American. The Boston parties filed a letter of intention not to file a reply brief.

argument has been heard, and the case stands submitted for decision.

Upon consideration of the record and the contentions of the parties, the Board finds that it is in substantial agreement with findings and conclusions of Judge Cusick as to the lawfulness of the present rate structure. Specifically, the Board finds that the North Atlantic cargo rate structure, other than the minimum charge structure, unduly prefers New York and unduly prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit and Chicago; that the differences in minimum charges between New York and the gateways west of New York at issue are unduly prejudicial to the farther gateways; and that the IATA resolutions which establish this rate structure are adverse to the public interest. However, the Board finds that it is not in agreement with the Judge's proposed method for elimination of the unlawful preference and prejudice. Rather than common-rate the east coast gateways and construct rates to the inland gateways on a form of mileage basis, the Board finds that rates, other than minimum charges, should be based upon the mileage from European points to all of the various U.S. gateway points involved in this proceeding. We are unable to determine on this record the lawful minimum charge structure; however, we expect that in the carriers' subsequent tariffs and agreements, any differences in the minimum charges applicable to or from the various U.S. gateways at issue will be justified on the basis of the difference in total costs for such shipments moving between European points and the various gateways. Accordingly, except as modified herein we accept as our own findings and conclusions of Judge Cusick in the initial decision, which we attach hereto as an appendix.

The Board takes note of the fact that Agreement CAB 21046, which was the subject of the hearing, expired by its terms on October 1, 1971, and was subsequently replaced by Agreement CAB 22969. That latter agreement was

approved by the Board in Order 72-6-137, June 29, 1972, subject to such modifications as may be warranted in light of the Board's decision in this proceeding. In light of the expiration of Agreement CAB 21046, this proceeding, insofar as it concerns Board approval of that agreement, is now moot. However, to the extent that Agreement CAB 22969 continues in force resolutions contained in the earlier agreement inconsistent with our findings and conclusions herein, it is in violation of the Act, adverse to the public interest, and unlawful, and our approval of said Agreement will be conditioned upon conformance of said Agreement to our findings herein.

General and Specific Commodity Rates

The North Atlantic Rate Structure

Each of the cities party to this proceeding is named as a point authorized to receive non-stop service to and from Europe on the certificates of one or more air carriers, and is currently receiving direct single-plane service to points in Europe. The freight rate structure does not, however, reflect the availability of these direct services. Generally, rates to cities other than New York are constructed by the use of arbitraries of add-ons to the New York-London base rate.[6] General commodity rates (GCR's) for U.S. cities other than New York are determined by adding a published arbitrary to the New York-London rate in order to determine the through rate to London from the other point.[7] These arbitraries are determined by finding the lowest possible combination of rates from the U.S. point to London, including possible trans-border rate through Montreal, and

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[6] Montreal and New York are common-rated for the purpose of North Atlantic cargo rates, and either city may be used as a construction point.

[7] Boston's GCR's are lower than New York's, but higher on a per-mile basis.

then subtracting the New York-London rate from the total. Specific commodity rates (SCR's) are published as through rates to New York from all European points to which the rate applies.[8] Other U.S. cities may take advantage of these rates by combining therewith the lowest available domestic rate or combination of rates from the city in question through either New York or Montreal. For the cities of Philadephia, Baltimore, and Washington, the IATA carriers publish, pursuant to agreement, arbitraries to the New York-European points base rate. These arbitraries cannot be used to construct rates to other U.S. cities. The above construction of rates applies regardless of the routing actually utilized by the carrier.

Section 404(b) Issues

The above-described method of constructing freight rates generally produces rates per mile higher at the other gateways than at New York. This raises the issue whether such disparate rate treatment of the other gateways contravenes section 404(b) of the Act. That section provides that:

> No air carrier of foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any paticular person, port, locality, or description of traffic in air particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The parties do not dispute that a *prima facie* case of undue preference and prejudice is established upon a showing: first, that the traffic moves under a rate structure which prejudices one party while preferring another; second, that a competitive relationship exists between the prejudiced and preferred parties; third, that the preference and prejudice is of an undue character; and fourth,

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[8] Boston is common-rated with New Uork for all SCR's.

that such preference and prejudice has resulted in economic injury to the prejudiced party. Judge Cusick found that the North Atlantic cargo rate structure unduly prefers New York and unduly prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago. These findings were based on the following facts. First, for almost every SCR and at most weight breaks, the rate per mile for New York shipments is generally lower than the equivalent rate per mile available for shipments to or from any of the other cities. Second, a substantial volume of North Atlantic cargo moves to New York from all over the United States via truck, apparently for reasons of price expediency. Third, a widespread system of commonrating exists on the European side of Atlantic, and this practice adversely affects U.S. shippers outside of New York who are required to pay more than New York area shippers to transport similar items shorter distances. Finally, for those European cities beyond London for which add-ons exist, the amounts of such add-ons are substantially less than the add-ons that exist in this country for similar distances beyond New York. Judge Cusick concluded that rate structure has increased New York's predominance as a gateway for cargo shipments to Europe beyond what it might otherwise be, and has depressed the utilization of other U.S. gateways below what would be expected from the cargo potential available and the quality of those facilities.

Upon a review of the record, we find that we agree with these conclusions. Specifically, we find that the North Atlantic cargo rate structure maintained pursuant to agreement by the IATA carriers prefer New York and prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago; that each of the prejudiced cities is competitive with New York for the movement of transatlantic cargo, and that shippers in these cities are also in competition with shippers in the New York area; that the existing preference and prejudice is undue; and that the rate structure has resulted in economic injury to

the complaining gateways, and to shippers utilizing the North Atlantic services available at those gateways.

Only two parties, TWA and Seaboard, except to the Judge's findings.[9] Seaboard's position is that the complaining cities have failed to show the extreme prejudice necessary for a finding that the existing rate disparities constitute undue or unreasonable preference or advantage. Both carriers argue that the Board has adopted as the standard for evaluation of fare differentials among gateways that the difference in fares merely be reasonably related to differences in distance.[10] The carriers argue that the applicable per-mile rates to and from the cities at issue generally approximate the New York rate, and in many instances are even equal to or lower than the New York rate. Seaboard also argues that the rates to cities more distant from Europe than New York properly reflect the higher line-haul

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[9] As previously noted, several foreign carriers filed exceptions to the initial decision. See *supra*, note 4. However, except for Alitalia, none of these carriers filed a brief in support of its exceptions, and therefore, in accordance with Rule 31 (14 C.F.R. § 302.31) of the Board's Procedural Rules, these exceptions have not been considered. Counsel for Alitalia filed a Statement of Position, and participated at oral argument. During the argument counsel sought to rely upon certain charts, the introduction of which was objected to by counsel for the Virginia parties, on the ground they had not been introduced at the hearing, and, therefore, had not been subjected to cross-examinations, or discussion on brief. We do not find it necessary to rule on this objection. Rule 32 of the Board's Procedural Rules (14 C.F.R. § 302.32(b)) provides in part that charts and other written data to be used at oral argument shall be circulated to all parties, and copies filed with the Docket Section of the Board, five (5) calendar days before the argument. Counsel did not comply with this requirement, and the charts will not, therefore be further considered herein. Although Alitalia filed exceptions to the initial decision, counsel stated at oral argument that Alitalia takes no position on the legal issues involved in this proceeding. Transcript at pages 68-69.

[10] Citing Order 69-7-149, July 29, 1969, IATA Agreements relating to Philadelphia/Baltimore/Washington—transatlantic fares.

and station costs associated with operations to such points and the substantially lesser volume of North Atlantic traffic at those cities.

To begin with, while it may be true that some rates to the other gateways are reasonably related to the mileage involved, the record clearly establishes that the overall pattern of rates is one of significantly higher rates on a per-mile basis as between the other gateways and New York.[11] This is particularly true of SCR's, which, in terms of tonnage, account for 65 to 85 percent of the traffic.[12] For example, although the Detroit-London mileage is only 9.1 percent greater than the London-New York mileage the SCR for automobile parts to Detroit, depending upon the applicable weight break ranges from 18 to 31.5 percent above the rate at New York.[13] Likewise, the mileage from Philadelphia to Frankfurt is 2.3 percent greater than the New York to Frankfurt mileage, although for SCR code number 4316 (applicable to data processing systems), the rate from Philadelphia to Frankfurt is up to 3.8 percent greater than the New York rate, depending upon the weight break; and for commodity code 8550 (applicable to a variety of electronic measuring instruments), the rate from Frankfurt to Philadelphia exceeds the New York rate by up to 4.9 percent.[14] The situation at Baltimore *vis-a-vis* New York can be seen from a comparison of the rates to Paris under commodity code 4316. Although the mileage from Baltimore to Paris exceeds the New York mileage by only 4.9 percent, the rate differential is from 7.5 to 12 percent

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[11] See *e.g.* exhibits BOS-1, Chicago Exhibit-3, Detroit-1002, IAD-104, SW-IR-5, and BE-101. The Board takes note of the fact that the Cleveland, Detroit, and Chicago rates shown in BE-101 are not properly constructed. See exhibit PA-R-4.

[12] See Exhibits SW-IR-8, TW-IR-8, ILA-5, and TAP-IR-5.

[13] See Detroit 1002.

[14] See BE-101.

above the rate at New York.[15] Based on the extensive evidence of the substantial disparities involved, we are persuaded that the rates are not reasonably related to the distances involved, and that the structure generally prefers New York are prejudices the other gateways.[16]

Seaboard's contention that the higher rates to cities other than New York properly reflect higher line-haul and station costs is unsupported by the record. With respect to the latter element, data submitted on costs at the various terminals involved in this proceeding, appear to reflect differences in the average size per shipment at the various gateways rather than any inherent differences in the levels of costs. Accordingly, the record will not support any conclusive findings with respect to differences in terminal costs at the various gateways that would justify the existing rate disparities. As for line-haul costs, Seaboard and most other carriers stipulated that direct aircraft operating costs are proportionate to miles flown. If line-haul

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[15] See BE-101.

[16] The carriers' reliance on the IATA transatlantic fares case, Order 69-7-149, July 29, 1969, is misplaced. Although the Board therein accepted fares that were not equal on a per-mile basis, it did so only after finding the fares reasonably related to the mileages involved. In the present proceeding, however, after an evidentiary hearing on this issue, and based upon the extensive evidence of record previously summarized, we have reached a different conclusion as to the rates at issue herein. Moreover, the disparities accepted in 1969 represented substantial reductions from earlier proposed fares, and a refusal to accept the reductions could have resulted in an open rate situation in which the status quo probably would have prevailed. Certainly, it is not at all certain that we would today accept differentials similar to those agreed upon in 1969 as reasonable in relation to the mileage. See *e.g.*, Statement of the Civil Aeronautics Board on North Atlantic and Mid Atlantic Fare Matters to be negotiated at the IATA Traffic Conference in Montreux, July, 1972, wherein the Board urges adoption of fares based upon shortest nonstop mileages for each U.S. point certificated for transatlantic service.

costs are proportionate to miles flown, then obviously they cannot be relied upon as justification for higher per-mile rates for cities beyond New York.[17]

TWA, however, refused to so stipulate. TWA's position is that the increased distances involved in flying non-stop from Europe to cities beyond New York causes direct operating costs to increase. This is claimed to result from the required sacrifice of available payload capacity in order to fly the longer distances.[18] In addition, TWA claims that operational restrictions at Baltimore not existing at New York increase unit costs at the former 42% above the unit costs at New York.[19] Both Judge Cusick and the Bureau rejected TWA's cost argument because it requires a presumption that the aircraft will always be operating at 100-percent capacity.

The Board finds itself in agreement with the conclusion of Judge Cusick and the Bureau, although for different reasons. To begin with, TWA's claimed cost increase is based solely upon direct operating costs, and does not consider the effect of indirect costs on the average cost per unit. Indirect costs, a substantial portion of total costs, tend not to vary with mileage, and on a per-mile basis these costs decrease as the distance increases. Thus, any increases in direct costs per mile would tend to offset by decreases in indirect costs. TWA's failure to include the indirect costs in its calculation destroys the validity of its exhibit. Moreover, the TWA exhibit is based upon a totally hypothetical operation. TWA provides no direct all-cargo service from Baltimore to Europe, so that its calculations are not subject to verification. It has made no showing that the costs it would actually incur, were it to provide the service involved, can be expected to follow the pattern

[17] The stipulations are summarized in exhibit BE-103.

[18] Exhibit TW-IR-4b.

[19] *Id.*

projected in the exhibit. Finally, TWA's claim is based upon the performance characteristics of only one particular type of aircraft even though cargo service is provided in both combination and all-cargo equipment, and types of all-cargo equipment different from that on which the exhibit is based are in use.

Nor has TWA supported its claim that unit costs at Baltimore are 42% higher than at New York. While the carrier did submit an exhibit purporting to establish higher costs at Baltimore, a number of crucial assumptions underlying the exhibit could not be adequately explained by the sponsoring witness.[20] *Inter alia,* the witness did not know the months of the year on which the exhibit was based; the period of day upon which the calculations of average temperature were made; and whether or not the exhibit was based upon conditions normally experienced during periods in which freight operations generally occur.

In sum we find that the carriers have failed to provide any cost justifications for the disparities in the rates per mile between the various gateways.[21]

Finally, TWA alleges that the record fails to establish that shippers in the complaining cities are disadvantaged *vis-a-vis* New York area shippers in marketing their goods

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[20] See transcript at pages 664-667 and 694-696.

[21] Additionally, even if we were to accept TWA's position that unit costs increase with distance, it would not adequately explain the rate structure. To begin with, for SCR's, Boston and New York are common-rated even though Boston is closer to Europe. Under the TWA methodology, Boston should have lower rates per mile than New York. Also, the carriers have accepted extensive common-rate situations in Europe even though under TWA's methodology significantly higher costs should be involved in any haul longer than New York-London. Obviously, the rate structure does not reflect the economic analysis put forth by TWA, and its exhibits do not justify the significant rate disparities between the U.S. gateways.

in Europe, and that the impact of the rate structure on the division of traffic has not been established. However, we find the record supports Judge Cusick's findings that there are shippers in the complaining cities who both import and export goods through their local airports in competition with shippers in the New York area, and that these shippers are required to pay higher rates per mile than shippers at New York.[22] Likewise, we find the record sufficiently establishes that the rate disparities have contributed to the diversion of freight to New York.

We do not find in the record an adequate justification of the preferences and prejudices created by the rate structure. It appears that the maintenance of the existing rate disparities is largely attributable to the desire of carriers (principally foreign) who do not provide service to the other gateways to lessen the impact of dilution on their revenues from freight originating at or destined for gateways other than New York.[23] In order for these carriers to participate in traffic movements to and from these other gateways, it is necessary for them to offer through rates which are competitive with the carriers providing direct service. If the latter rates are less than the combination of the North Atlantic rate to New York and the local domestic rates to the beyond gateways, all or part of the difference would have to be absorbed by the North Atlantic carrier, thereby reducing its earnings for the transatlantic portion of the route and diluting the yield for the carriage. The present rate structure, which produces high rates for the beyond gateways, minimizes this yield dilution, and, in addition, encourages shippers to by-pass

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[22] In making these findings, Judge Cusick relied principally upon the extensive cross-section of shipper testimony in the record. We are likewise persuaded by such testimony. See e.g. BAL-T-7, transcript at pages 182-187, BAL-T-8, transcript at pages 190-191; BOS-4 and BOS-T-1; DET-T-3 and DET-T-4; Chicago exhibit No. 3; and IAD-T-8, and IAD-219.

[23] See transcript at pages 422-430.

the beyond gateways in favor of New York. The carriers benefiting from this structure have been able to frustrate attempts to improve the rate structure by exercising veto power through the IATA unanimity rule.

In our judgment, the private interests of carriers in preserving their yields from traffic originating at or designated to points not served by them is clearly insufficient justification for a discriminatory rate structure. Where the Board has found direct service to be in the public interest, the rate structure should reflect the availability of those services. Carriers not providing direct service cannot be permitted to deny the shipping public the benefits accuring from the direct services provided by other carriers.

Section 412 Issues

The second major issue in this proceeding is whether the IATA resolutions which provide for the establishment of the present rate structure are adverse to the public interest or in violation of the Act, and, therefore, whether the Board should withdraw its approval of them under section 412(b) of the Act. That section provides in pertinent part as follows:

> The Board shall by order disapprove any . . . contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement . . . , that it does not find to be adverse to the public interest, or in violation of this Act . . . .

Having found that the rates violative of section 404(b), it necessarily follows that the IATA traffic conference resolutions providing for the establishment of those rates are "in violation of the Act" under the terms of section 412(b). Moreover, Judge Cusick found that the rate structure encourages the use of surface transportation to bring North Atlantic cargo to New York for overseas shipment from that point, that this method of transporting cargo is not in accord with the policy objectives of section 102(a) of

the Act, and that the agreements are, therefore, adverse to the public interest. Additionally, the Judge found that the concentration of cargo at New York contributes to crowded conditions, delay, pilferage, and customer dissatisfaction, and that failure to take action to alleviate these conditions would be adverse to the public interest.

TWA and Seaboard excepted to these findings that the agreements are adverse to the public interest. The carriers argue in support of the agreements that the rate structure is not the cause of New York's preeminence as a gateway. It is undoubtedly true that the many factors cited by the carriers as contributing to New York's preeminent position [24] do in fact influence the flow of cargo to New York. It must also be stated that the record does not enable us to make any quantification of the adverse impact of the current rate structure on the movement of freight through the other gateways. Nevertheless, considering the substantial rate disparities previously detailed,[25] the only reasonable inference is that a substantial amount of traffic that would ordinarily be routed through a gateway other than New York is trucked to New York solely to take advantage of the lower rates.[26] Considering the policy

[24] Among the factors cited by the carriers are the following: the greater frequency of service at New York, and the service to many more European points; the number of foreign carriers serving only New York who direct their entire sales effort to route cargo via New York; foreign consignees routing cargo via their own national carrier; the extensive freight forwarder activity at New York; and the level of traffic the New York market itself generates.

[25] See pages 8 and 9, *supra*.

[26] This is what we believe the Judge had in mind when he found that the surface movement of cargo to New York contravened the policy directives of the Act. TWA's assertion that the use of ground transportation in connection with air transportation is not adverse to the public interest accordingly misses the point. The failing of the present rate structure is not that shippers and carriers utilize trucking operations to bring cargo to New York, but that it encourages shippers to truck cargo to New York even though another gateway with adequate service may be closer.

favoring decentralization,[27] we find that the present structure is adverse to the public interest.

TWA and the Port Authority also contend that the record will not support Judge Cusick's findings of congestion, delay, and pilferage existing at New York. We affirm those findings.[28] With respect to congestion and delay, the evidence of record is concededly less than optimum, based as it is upon a one-month sample taken in January 1971. Nevertheless, it is not contended that a similar survey taken today would produce substantially different results, and on the basis of that evidence of record, it appears that the New York international airport is more congested, and that shipments using New York are more susceptible to delays, than is the case with the other airports.

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[27] The Board has previously found that decentralizing the total transatlantic cargo flow to gateways other than New York is in the public interest. Domestic Coterminal-Europe All-Cargo Investigation, Docket 18531, Order 69-4-140 and 141, March 17, 1969, at page 13.

[28] From the record in this proceeding, it is obvious that Judge Cusick's reference to congestion and delay refers to cargo handling in the warehouses and terminals at the various gateways, and not to aircraft movements into and out of the various gateways. Assertions by TWA and the Port Authority that the number of aircraft movements delayed each day at Kennedy Airport have been greatly reduced since the record herein was closed are therefore not relevant to the problems the Judge has found to exist.

The following chart indicates the extent of congestion at New York *vis-a-vis* the other cities:

HANDLING OF INBOUND NORTH ATLANTIC CARGO [29]

Carrier	City	Average freight-tons received per day	Average-freight-tons on-hand per day	Average freight-tons on-hand as a % of average daily tons received
Pan American				
	NY	45.3 tons	324.0 tons	715%
	Bal	1.6	4.0	250
	Bos	9.7	62.4	640
	Chi	10.3	6.2	60
	Det	7.1	19.3	270
	Phil	3.6	19.0	530
	Dulles	7.6	15.4	200
TWA				
	NY	56.1 tons	187.2 tons	330%
	Bal	1.5	5.2	350
	Bos	2.1	1.9	92
	Chi	2.0	2.8	140
	Clev	.4	.3	77
	Det	.06	.14	230
	Dulles	1.4	4.2	306
Seaboard				
	NY	78.5 tons	328.8 tons	419%
	Bos	2.3	4.8	209
	Chi	7.3	15.7	214
	Det	.5	1.4	311

Measuring congestion and delay in terms of the relationship between average tons on hand and average daily tons received, it appears that New York is by far the most con-

[29] The source of the data is Exhibits PA-5, TW-IR-2, and SW-IR-2. Seaboard has introduced an Exhibit SW-R-104 which purports to show that Baltimore, Washington, and Boston are all more congested than New York. The Seaboard exhibit appears to be based solely upon cargo handling of outbound freight. We think that the handling of inbound freight is a better measure of congestion since the outbound data will tend to favor New York because of the greater availability of transatlantic services.

gested of the various airports for Pan American and Seaboard. In the case of TWA, New York is a close second to Baltimore.

With respect to pilferage, reports currently being filed with the Board pursuant to Part 239, of which the Board takes notice, indicate that while JFK airport accounts for only 15.25% of the freight-tons enplaned by Pan American in its North Atlantic cargo operations, and 30.99% for Seaboard, these carriers reported that 25.81% and 71.32%, respectively, of their system pilferage claims occurred at JFK.[30] This data confirms Judge Cusick's finding and corroborates the shippers' testimony upon which that finding was based.

Rates for the future

We turn now to the question of what action the Board should take to remove the existing preference and prejudice. Judge Cusick proposed that the east coast gateways of Boston, New York, Philadelphia, Baltimore, and Washington, be common-rated, and that rates to the cities of Chicago, Cleveland, and Detroit be based upon add-ons to the applicable New York rate at the New York-London rate per mile. The initial decision is supported by the Baltimore, Virginia, and Philadelphia parties, and the Metropolitan Washington Board of Trade. Most of the other parties as well as the intervenors Port Authority and DOT except to this proposal.

We are in agreement with those who except to common-rating. We find that the existing preference and prejudice ought to be removed by requiring respondent carriers to file tariffs providing rates equal on a per-mile basis, for both specific commodity rates, container rates, and general

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[30] Source of the data is Schedule T-3, Form 41, and Schedule B, Form 239 for the quarter ended June 30, 1972.

commodity rates, to and from all gateway points at issue in this proceeding, and points in Europe.[31a]

Judge Cusick proposed common-rating of the east-coast gateways largely because of its prevalence on the European continent, the relatively short distances between the gateways, the "megalopolis" character of the so-called "Northeast Corridor," and his belief that decentralization of the North Atlantic cargo flow would result from such actions. The civic interests supporting common rates argue that only through common-rating will they be able to compete on an equal basis with New York, and that applicable law and equity require common rates for competing gateways. These parties also rely upon the existence of common rates in other markets as a justification for the impostion of common rates on the North Atlantic.

The carriers unanimously oppose common-rating. They argue that such a rate structure would have an adverse impact on revenues from cargo operations at the gateways other than New York, and would result in an overall increase in North Atlantic freight rates. The carriers also argue that prior Board precedents do not support the imposition of common rates on the basis of the facts here presented.

Boston opposes common-rating as to Boston since this would cause an increase in the general commodity rate of Boston, giving that city the highest rate per mile of any of the competing gateways. Boston argues that such a rate structure would be unduly prejudicial to it, and prefer-

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[31a] We will, however, permit the continuance of the practice of common-rating Baltimore and Washington, in view of their geographical proximity, and the fact that Friendship Airport serves both cities. Also, since the intra-European common-rate structure was not at issue in this proceeding, we will permit deviations from a strict mileage formula where necessary to preserve the current common-rate relationships among European points.

ential to Philadelphia, Baltimore, and Washington.[31] A similar argument is made by the Port Authority.

At the outset, it should be noted that the Board has never required common rates although in certain cases it has permitted such rates when carrier-initiated.[32] Generally, Board policy has not favored such rates on the ground that charging the same rate for a longer distance as for a shorter one is unsound and not justified under the Act.[33] The Board has permitted carriers to establish such rates only when special circumstances can be shown to exist.[34] We need not determine, however, whether we would permit common-rating of these gateways if carrier initiated since no carrier is currently seeking such a rate structure.

We have considered the record, the findings of Judge Cusick, and the contentions of those parties seeking common rates, and can find no justification for the imposition of such rates by the Board. In our judgment, common-rating would not eliminate the inequities in the North Atlantic freight rates, but would merely create a new set of preferences and prejudices. For example, if Baltimore

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[31] Both the Baltimore parties and the Metropolitan Washington Board of Trade take no position on whether the common rates they seek ought to include Boston.

[32] The exception which, so to speak, proves the rule is the *Hilo-Mainland Temporary Service Investigation*, Order E-25253, June 6, 1967, and Order E-25739, September 26, 1967. Therein, the Board conditioned certificate authorizations to serve Mainland-Hilo on the maintenance of joint common fares to and from all points in Hawaii receiving certificated service. The Board found such a condition necessary to protect the intra-Hawaiian carriers from revenue diversion from direct Hilo service serious enough to jeopardize their financial solvency. Similar considerations are, of course, not present in this proceeding.

[33] See *e.g.* The Hawaiian Common Fares Case, 37 C.A.B. 269 (1962).

[34] *Id.*

and New York are common rated and the rates to Cleveland based upon the additional mileage between Cleveland and New York, as proposed by the Judge, Cleveland's rates would exceed Baltimore's by 12.3 percent.[35] Yet the mileage from Cleveland to London is only 3.2 percent greater than the Baltimore to London mileage. Also, common-rating would increase GCR's at Boston while decreases would occur in those rates at Baltimore, Washington, and Philadelphia. Shippers to and from these more distant points would have the benefit of lower rates on a per-mile basis than Boston shippers, depriving the latter of their inherent advantage of location.

The carriers' opposition to such rates as essentially uneconomic has not been satisfactorily rebutted by any party. Two different problems are involved: *first,* reduction of revenues on freight originating at or destined for gateways other than New York if the rates at those gateways are reduced to the level at New York, and *second,* decreased yields for transatlantic carriers resulting from pro-rating with U.S. domestic carriers on shipments originating at or destined for gateways other than New York which are routed over the domestic carrier via New York. The carriers argue that the impact of these two factors if common-rating is imposed will inevitably require compensating increases in transatlantic cargo rates. Baltimore argues in response that the carriers' cost argument goes to the level of the rates, a question expressly excluded from the investigation, not the issue of preference or prejudice and should be ignored. We do not agree. Although the reasonableness of any of the rates at issue is not involved in ths proceeding, we cannot ignore the economic impact of any adjustments in the rate structure ordered herein.

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[35] Clev-Lon-3751 miles; Bal-Lon-3635 miles; NYC-Lon-3456 miles; and Clev-NYC-425 miles. Source IATA mileage Manual 8th ed. and BE-101.

There is no basis for any finding that the revenue losses stemming from the dilution in yield would be made up by revenue increases from newly generated traffic. Only two parties attempted to determine the amount of additional traffic that would move through their respective airports if common-rating were introduced.[36] Although a great deal of controversy surrounds these exhibits, it appears that even accepting them at face value, the amount of generated revenues projected by the Baltimore and Virginia parties would be insufficient to offset the dilution in yields resulting from common rates.[37]

The Board finds nothing in the record that would justify imposing a rate structure which would provide lower per-mile rates to Philadelphia, Baltimore, and Washington than to the other gateways and which at the same time would require a rate increase at all points in order to prevent the lowered yields from adversely affecting carriers' earnings.

The Baltimore and Virginia parties rely heavily upon decisions of the Interstate Commerce Commission and the Federal Maritime Commission and its predecessors to support their position that common rates are legally required for competing gateways. However, questions of preference and prejudice are principally questions of fact, and thus, removed from the absolute constraints of precedent.[38] For

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[36] The Baltimore and Virginia parties. The information is contained in Exhibits BAL-107 and IAD-210.

[37] Exhibits SW-R-107 and SW-R-108.

[38] Board of Trade v. United States, 314 U.S. 534, 546 (1942). Therein, Mr. Justice Frankfurter, speaking for the majority wrote that:

. . . [T]his [the prohibition against undue or unreasonable preference or advantage] does not mean that the law compels identity of treatment for like services at different places . . . . 'Whether a preference or advantage . . . is undue . . . is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . . .'

this reason, it serves little purpose to quote at length passages from the opinions of other administrative tribunals without examining the facts upon which those decisions were based, the policies being pursued, and the factors deemed relevant to the issues presented. We take note of that fact that there are significant differences in the manner in which the Board and the ICC view rate matters. These differences may in part be explained by the differences in the cost structures of the railroad and airline industries. In the former there are increasing returns to scale brought about by low variable costs and high fixed costs.[39] Marginal cost is less than average cost, and, therefore, as traffic expands average costs decrease. For this reason, value of service pricing is quite prevalent, and distance as a determinant of cost is often ignored.[40] In the aviation industry, returns to scale are relatively constant, making cost of service, including those costs directly distance related, a far more significant determinant of rates. For these reasons, we are not presuaded by the precedents relied upon that common rates for the east coast gateways are required or desirable as the basis for the North Atlantic freight rate structure.

The civic parties also rely on the existence of common rates in other air markets as justifying such rates on the North Atlantic. However, we have consistently refused to find rates lawful simply because there were other markets

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[39] See *e.g.* D. Philip Locklin, Economics of Transportation 6th Ed. (1966). Locklin states that:

> Of fundamental importance in the explanation of discriminating railroad rates is the large mass of constant or fixed expenses which has characterized the industry in the past. This characteristic . . . still exists, although to a lesser degree . . . . The extent to which the theory of rates, developed with respect to railroads, is applicable to . . . other modes of transport depends upon the extent to which the same cost conditions exist . . . . *Id.* at p. 156.

[40] See *e.g. Nueces County Navigation District No. 1* v. *Atchinson, Topeka & Santa Fe Railway Company,* 325 I.C.C. 400, 408 (1965).

and other rates to which the proponent could point as supporting the lawfulness of the rates at issue.[41] The factual circumstances that might justify common rates in other markets are not now before the Board, and in any event the existence of such rates can offer no support to those seeking the mandatory impostion of such rates in the North Atlantic markets.

Both Judge Cusick and the Baltimore and Virginia parties place great emphasis on the common-rating of European cities in the IATA rate structure as justification for common rates for the east coast gateways. However, it has not been shown that common-rating of points in Europe adversely affects U.S. shippers or ports, or gives rise to a need for similar common-rating of U.S. points. If for a particular commodity, 42 points in Europe are common-rated to New York, under the existing rate structure, the same 42 points are common-rated to any other U.S. city. Likewise, if the rate from New York to a given city in Europe is two cents more than the rate from New York to London, it is two cents more than the rate from any other U.S. city to London. The fact that the European points may be common-rated while U.S. points are not does not result in preference or prejudice to the U.S. points. Similarly, the fact that the rate may be two cents for an additional 400 miles beyond New York may be four cents does not by itself create a prejudice to the interior U.S. points. We conclude that the extensive common-rating of European points does not justify the impostions of a similar structure for U.S. points.

Finally, there is the contention that common rates will promote the decentralization of the cargo flow thereby reducing the concentration at the New York gateway. As previously indicated, the Board has favored decentraliza-

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[41] Delta Off-Peak Coach Fares, 39 C.A.B. 377, 382 (1963); American Airlines Off-Peak Coach Service, 28 C.A.B. 25, 30 (1958); Hawaiian Common Fares Case, 10 C.A.B. 921, 926 (1949).

tion in order to reduce the congestion, delay, and pilferage existing at New York. We are not persuaded, however, that the situation is so critical that what is essentially an inequitable and uneconomic system is required to correct it. In our opinion, mileage-based rates will remove the price incentives favoring New York, and shippers will now be able to choose on the basis of all of the relevant service considerations without the influence of an unduly preferential/prejudicial price structure.

In view of the foregoing, we have determined not to require adoption of the principle of common-rating U.S. gateways. Moreover, for essentially the same reasons, we find the most equitable and practical rate structure is one based upon mileage. Since costs tend to vary with miles flown, basing rates upon mileage will produce a more cost-based rate structure than either the current system or common rates. In addition, mileage-based rates preserve to each gateway the relative advantages of its geographic location.

It is argued by the Baltimore parties that specific commodity rates are incompatible with the mileage concept. The argument is that since distance is normally not a significant criterion is the establishment of specific commodity rates, and is not even included as a criterion in the applicable IATA resolution, it is incongruous for the Board to order that such rates be equalized on a per-mile basis. This argument misconceives our purposes herein. The Board is not attempting to determine what factors IATA should use to establish the level of specific commodity rates, but rather to insure that those rates are available on a nondiscriminatory basis to competing gateways. Since our finding that the existing rates are unlawful is based upon the unjustified disparities in the existing per-mile rates, basing rates upon mileage at a rate per mile will eliminate the cause of the undue preference New York is currently receiving. The elimination of New York's rate advantage will tend to reduce the amount of North Atlantic cargo

currently by-passing other gateways in favor of New York in order to receive the lower rates available there, and thus should encourage the decentralization of the total North Atlantic cargo flow which we have found to be in the public interest, and we cannot find the record establishes that only common rates would effectuate such a result. Finally, mileage-based rates, while eliminating the existing preference and prejudice, and reducing the undue economic incentive for shippers to utilize New York, does so without creating cost pressures on the carriers that could result in an increase in the overall rate level.

Although Judge Cusick found that rates to Detroit, Chicago, and Cleveland should be constructed by adding to the New York-European point rate an amount based upon the mileage between those gateways and New York, at the transatlantic rate per mile, he offered no explanation for this conclusion. For all of the reasons previously discussed, we find that rates to these inland gateways should be based upon the same mileage principle adopted for the east coast gateways.

Minimum Charges

The current minimum charge for shipments moving between New York/Boston and points in Europe/Africa is $24; the minimum charge from the other U.S. gateways at issue is $27 (Order 72-6-137, June 29, 1972). Judge Cusick found that this minimum-charge structure is unlawful and that minimum charges at gateways other than New York should be common-rated with the New York minimum charge at the then-existing charge of $22. The carriers objected to his findings on the grounds that the record does not support common-rating and that setting the charge at $22 was beyond the scope of the proceeding. As explained below, the Board agrees with Judge Cusick's conclusion that the minimum-charge structure is unlawful. However, on this record we cannot conclude that common-rating of the gateways is necessarily the appropriate remedy.

The costs of transporting a particular shipment include fixed costs, which are essentially constant regardless of the distance the shipment moves (*e.g.*, documentation, loading and unloading), along with the variable, or line-haul, cost of moving the shipment from origin to destination. As a general rule the costs of trans-oceanic freight shipment tend to vary in proportion to the distance flown. Minimum-charge shipments, however, are much smaller than freight shipments in general. For the four carriers (Finnair, Seaboard, TAP and TWA) reporting such data, minimum-charge shipments weighed an average of 9.7 lbs. versus 760.3 pounds for their other shipments (Exhibit BC-104, p. 3). For such small shipments then, it is self-evident that the fixed costs constitute a much greater percentage of total costs than is the case generally, and the line-haul costs, because of the low weight of the shipment, will be a much smaller percentage of the whole.

It is clear from the foregoing that the costs of these small shipments do not increase proportionally with distance. Nevertheless, the difference between the New York minimum charge and the minimum charge applicable to the farther gateways is 12.5 percent, while in all but one instance, the difference in mileage alone is significantly smaller.[42] Viewed in this context, the present minimum-charge structure is clearly unduly preferential and prejudicial.

Because of the absence of a thorough costing of minimum-charge traffic by the parties, we are unable to definitively quantify the proper relationship between minimum charges at New York and those at other gateways.[43] How-

[42] The one exception is Chicago, which, in comparison to New York, is 14.4 percent further from London and 12.9 percent further from Rome.

[43] As found elsewhere in this opinion, the record fails to disclose demonstrable differences in fixed costs as among the gateways in issue.

ever, the relatively high proportion of fixed to total costs of such small shipments in all likelihood is such that the slight mileage differences involved herein may not justify more than a minimal differential, if any, above the New York minimum charge for the gateways more distant from New York. While we will not at this juncture compel the carriers to introduce common-rated minimum charges, we will expect any agreement or tariff filing which does not embody common-rated minimum charges to be accompanied by a thorough cost justification. We will reserve jurisdiction pending the submission of new tariffs for the purpose of taking such action as may be appropriate in the event that these filings are not adequately justified.

Rates for Non-Gateway Points

The intervenor Memphis raises the basic issue of the North Atlantic rate structure as applied to non-gateway interior U.S. points. Memphis' position is that any adjustments in the rates applicable at Cleveland, Chicago, and Detroit should also be required for other cities affected by those adjustments, including Memphis.

As previously noted, under the present rate structure specific commodity rates to interior points are constructed by adding to the New York-European point rate the lowest available domestic rate, except that for the cities of Philadelphia, Baltimore, and Washington through specific commodity rates are established by adding agreed arbitraries to the transatlantic rate. General commodity rates are established by adding published arbitraries to the New York-London base rates. These rates apply regardless of the gateway through which an all-air shipment is routed.

Memphis argues that if the existing method of constructing rates to the named inland gateway points is unlawful, then it is equally unlawful when applied to Memphis. If the Board orders removal of the discrimination at the three named interior points and not Memphis, such action would

in Memphis' view, prejudice and discriminate against Memphis in favor of the other interior points.

Pan American opposes any adjustments to the current method of constructing rates to Memphis and other non-gateway points, arguing that such rates are outside the scope of the proceeding. Pan American also argues that since Memphis' participation in the case has been limited to the filing of a brief to the Board, the record is devoid of any evidence to support Memphis' position, and that the economic consequences of such action has never been considered. The Bureau supports Pan American's position arguing, in addition, that mileage-oriented rates for gateways ought not to become a precedent for establishing similar rates to other than U.S. certificated points.

It is clear that the questions raised by Memphis and the relief now sought herein are beyond the scope of the proceeding. The order instituting this investigation confined the scope to comparison of rates to New York and seven other named gateways (Order 69-3-47, ordering paragraph 1, as amended by Order 69-4-139, and 69-10-111). In any event, Memphis' participation in this case has been limited to its filing of a petition for leave to intervene and a brief to the Board. As a result, the record contains no evidence upon which we could base any findings with respect to the construction of rates to Memphis.

However, note here should be taken of Order 72-6-137, dated June 29, 1972, approving *pendente lite* a new transatlantic cargo agreement by the members of IATA.[44] In

[44] In granting such approval, the Board imposed several conditions considered necessary to prevent a compounding of the preference and prejudice problems. Specifically, the Board precluded increasing the minimum charges at "interior" U.S. cities over and above those increases approved for "gateway" cities. Order 72-6-137, June 29, 1972, at pages 8 and 9. We have already disposed of this matter for the gateways other than New York, *infra* at pages 22-28. Although we have found herein that the

granting such approval we deferred decision on certain aspects of the agreement, criticized by Memphis, pending this decision. Specifically, we deferred decision on the validity of certain provisos which precluded combining agreed arbitraries for Baltimore/Washington, Philadelphia, Detroit and Chicago with domestic rates in constructing through rates to other points. We will continue to defer this matter pending the submission of a revised agreement for individual carrier tariffs pursuant to our order herein. The carriers will undoubtedly wish to review the rate structure to non-gateway interior U.S. points in light of the decision herein. We will expect that any filings of such agreements or tariffs will be accompanied by a justification of the structure employed for these non-gateway points. Memphis and other cities similarly situated will have an opportunity to object to any proposed new structure.

Ultimate Findings and Conclusions

On the basis of all the foregoing facts and considerations, it is found that:

1. The North Atlantic cargo rate structure, including local and joint general commodity rates, specific commodity rates, container rates and minimum charges, is unduly preferential to New York, and unduly prejudicial to Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago.

2. The issue whether Agreement CAB 21046 is adverse to the public interest or in violation of the Act is now moot.

3. Agreement CAB 22969, approved by the Board in Order 72-6-137, dated June 29, 1972, is adverse to the pub-

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rates applicable at Memphis, and other interior non-gateway points, are beyond the scope of this proceeding, we would expect that any IATA agreements or carrier tariff filing providing differentials in the minimum charges at such points *vis-a-vis* the minimum charges applicable at interior gateways would be accompanied by a thorough cost justification.

lic interest, in violation of the Act, and unlawful, to the extent it embodies rates and charges found unlawful herein; approval of said Agreement should be conditioned upon conformance of the Agreement to our findings herein.

4. The lawful local and joint North Atlantic general commodity, specific commodity and container rates for service between the cities of Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago, on the one hand, and points in Europe, on the other hand, is the New York-European point rate per mile multiplied by the distance in miles between such cities and the point in Europe. The mileage to be used in determining the lawful rates is the shortest operated point-to-point mileage as shown in the latest edition of the IATA mileage manual: *Provided, however,* That such rates between Baltimore and Washington, on the one hand, and points in Europe, on the other hand, may be common-rated on the basis of the arithmetic average of the Baltimore-European point and Washington-European point mileages; *And provided further,* That such rates between the various U.S. gateway points mentioned above, on the one hand, and points in Europe currently common-rated, on the other hand, may continue to be common-rated based upon the lowest rate resulting from application of the above formula.

5. The record does not afford an adequate basis for determining the lawful relationship between the minimum charges applicable at the various gateway cities party to this proceeding. Any proposal embodying differentials in the minimum charges between any of the gateway cities shall be accompanied by adequate cost justification.

6. The lawful cargo rates between Memphis and other non-gateway cities, on the one hand, and points in Europe, on the other hand, are beyond the scope of this proceeding. The question of the lawful rates and charges between Memphis and other non-gateway interior cities and points in Europe will be considered in determining the lawfulness

of the new agreements and tariffs required to be filed herein.

7. The local and joint tariffs currently on file which provide rates inconsistent with our findings herein are unlawful and should be canceled. The carrier parties participating in air cargo services for through transportation of cargo between the cities of Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago, on the one hand, and points in Europe, on the other hand, via the North Atlantic, shall alter their local and joint rates, whether pursuant to agreement or by individual carrier action, to correct such undue preference and undue prejudice by appropriate tariff filings in conformance with our findings herein.[45]

An appropriate order is attached.

GILLILLAND, Vice Chairman, MINETTI, MURPHY and TIMM, Members, concurred in the above opinion. BROWNE, Chairman, did not take part in the decision.

APPENDIX

DOCKET 20522

The Administrative Law Judge's Initial Decision referred to herein is not attached to this copy because of the wide circulation given at the time of its release. The Initial Decision is attached to the original of the Board's opinion and to the official copies in the Board's files and may be examined there. It will also be printed as part of the official "Civil Aeronautics Board Reports."

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[45] The Board recognizes that since the parties have not fully explored the detailed provisions of a mileage-based rate order it may be necessary due to technical problems of implementation to make modifications to the order herein. We are, therefore, providing 120 days in which to implement our findings so that any such problems may be brought to our attention in petitions for reconsideration.

Order 73-2-24

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 6th day of February, 1973

Agreements Adopted by IATA Relating
to North Atlantic Cargo Rates

Docket 20522

ORDER

A full public hearing having been held in Docket 20522 and the Board, upon consideration of the record, having issued its opinion containing its findings and conclusions, which is attached hereto and made a part hereof;

IT IS ORDERED THAT:

1. Approval of Agreement CAB 22969 in Order 72-6-137, dated June 29, 1972, is hereby reconsidered and, upon reconsideration, approval of said Agreement is conditioned on conformance of the Agreement to the following: (a) establishment of specific commodity, general commodity, and container rates in conformance with paragraph 4 of the ultimate findings and conclusions appearing on page 32 of the opinion attached hereto; and (b) establishment of minimum charges in conformance with paragraph 5 of the ultimate findings and conclusions appearing on page 33 of the opinion attached hereto:

2. The air carriers and foreign air carrier parties adhering to or participating in the local or joint tariffs listed in the appendix shall discontinue demanding, charging, collecting, or receiving such preferential and prejudicial rates and amend their local and joint tariffs to conform with paragraphs 1, 4, and 5 of the ultimate findings and

conclusions appearing on pages 31, 32 and 33 of the opinion attached hereto within 120 days of the service of this order on not less than 30 days' notice: *Provided, however,* That instead of canceling said tariffs, the carriers may modify their tariffs to conform with the decision herein;

3. The Board retains jursidiction over this proceeding and may, upon petition, or upon its own motion and without further hearing, modify the rates and charges established herein, or otherwise modify this order in such manner as circumstances may require.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

APPENDIX

AGENTS:

Air Tariffs Corporation, Agent, C.A.B. Nos. 26 and 37.
International Air Traffic Tariffs Corp., Agent, C.A.B. Nos. 259, 399 and 400.
John M. Sampson, Agent, C.A.B. No. 10.

CARRIERS:

Air Canada, C.A. No. 27
Swissair, Swiss Air Transport Company Limited, C.A.B. Nos. 27, 32 and 33.
Trans World Airlines, Inc. C.A.B. Nos. 214 and 230.

Supplemental Opinion and Order on Reconsideration

(Order No. 73-7-9) Dated July 5, 1973

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 5th day of July, 1973

Docket 20522

AGREEMENTS ADOPTED BY IATA RELATING TO
NORTH ATLANTIC CARGO RATES

SUPPLEMENTAL OPINION AND ORDER ON RECONSIDERATION

The Board, by Order 73-2-24 (February 6, 1973), issued its decision in the above-entitled proceeding, in which it found, *inter alia*, that the existing North Atlantic cargo rate structure including general commodity rates, specific commodity rates, container rates, and minimum charges unduly and unreasonably prefers New York and unduly and unreasonably prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago. The Board also found that the lawful cargo rates between points in Europe, on the one hand, and the above-named cities, on the other hand, are the New York-European point rates per mile multiplied by the distance in miles between such cities and points in Europe. However, the Board found that the record did not afford an adequate basis for determining the lawful relationship between the minimum charges applicable at the various gateways. Finally, the Board found that the lawful cargo rates between Memphis and other non-gateway cities, on the one hand, and points in Europe, on the other hand, were beyond the

scope of the proceeding. The Board deferred, therefore, pending submission of revised agreements or individual carrier tariffs, consideration of the lawful North Atlantic cargo rates to interior non-gateway points.

Petitions for reconsiderations and/or clarification of the Board's decision and answers thereto have now been filed by several of the parties.[1]

Upon consideration of these petitions and answers, we find that they do not establish any error in our decision herein. However, in response to requests for additional time in which to implement our findings and conclusions, we have determined to amend our order herein so as to extend the time for filing tariffs in conformance with the decision until September 1, 1973. In response to requests for clarification of our order herein we have determined to amend that order in certain respects as set forth below.

1. Turning first to the petitions for reconsideration filed on behalf of the carrier parties, Trans World Airlines, Inc. (TWA) and Pan American World Airways, Inc. (Pan American) petitioned for additional time in which to implement the findings and conclusions in the decision. Specifically, these carriers seek until September 30, 1973, to implement the Board's findings and conclusions. However, as an alternative, Pan American requests an extension at least until July 30, 1973. An answer supporting the requested extension was filed by Seaboard World Airlines, Inc. (Seaboard). In their answers, the Metropolitan

[1] Petitions for reconsideration were filed by Trans World Airlines, Inc., Pan American World Airways, Inc., the Philadelphia parties, the Virginia parties, the Baltimore parties, and the Metropolitan Washington Board of Trade. Answers thereto were filed by Seaboard World Airlines, Inc., the Bureau of Economics, the Memphis parties, the Philadelphia parties, the Port Authority of New York and New Jersey, Trans World Airlines, Inc., Pan American World Airways, Inc., the Boston parties, and the Metropolitan Washington Board of Trade.

Washington Board of Trade, the Boston parties and the Port Authority state that they do not oppose the requests for additional time. The Bureau of Economics (the Bureau), in its answer, opposes the extension sought by the carriers but states that it would not object to an extension until July 1, 1973. The other parties in their petitions and answers take no position on the issue.

The Board had originally given the carriers until May 9, 1973, to implement the findings and conclusions contained in the opinion.[2] In so doing, the Board recognized that since the parties had not fully explored the details of implementing a mileage-based rate structure during the course of the proceeding, technical problems subsequently arising could occasion a need for additional time for compliance. The carriers argue in support of their requests that problems do in fact exist, including the recent dollar devaluation, and since the member carriers of the International Air Transport Association (IATA) were scheduled to meet on the North Atlantic cargo rate structure starting May 8, 1973, additional time would be necessary if the problems of implementation were to be resolved through the IATA machinery.

The existing agreement among the member carriers of IATA on the North Atlantic cargo rate structure expires on September 30, 1973. Considering the complex issues involved in negotiating a new agreement, and the interrelationship between this case and those negotiations the carrier requests appear reasonable and necessary if an orderly implementation of our findings is to be achieved through the IATA machinery. We have determined, therefore, to grant the carriers the additional time they seek in which to file tariffs implementing our findings and conclusions. However, we wish to emphasize that should

[2] By Order 73-5-36, May 8, 1973, the Board stayed, pending disposition of these petitions for reconsideration, the time for filing tariffs to implement the Board's findings and conclusions.

the IATA machinery fail to produce an agreement, then the Board will expect implementation by the individual carriers without further delays.

2. The petitions of the Baltimore parties, the Virginia parties, and the Metropolitan Washington Board of Trade (Board of Trade) seek reconsideration of the Board's determination not to require common rates between European points and the New York, Philadelphia, Baltimore, and Washington gateways. Philadelphia's answer supports these petitions insofar as they relate to Philadelphia. The answers filed by the carrier parties, the Bureau, the Boston parties, and the Port Authority support the decision. Upon consideration, we find nothing in these petitions that demonstrates error in the Board's findings.

The Board of Trade argues that in rejecting common rating, the Board failed to consider that the carriers currently operate flights between New York and Europe via either Philadelphia or Washington, and that on these flights, New York-originated cargo is carried further than cargo originated in either Philadelphia or Washington. This argument is similar to the carriers' contention in support of the existing structure that since large amounts of North Atlantic cargo is routed via New York, higher rates to beyond gateways are justified by the resulting pro-rating of revenues between U.S. domestic and international carriers. The Board rejected this argument, finding instead that where direct services have been found to be in the public interest, the rate structure should reflect the availability of those services. By the same token, the fact that not all flights operate via direct routings is not sufficient justification for charging New York shippers higher per-mile rates than shippers using the Philadelphia, Baltimore, or Washington gateways when direct services are otherwise available. For this reason, the Board finds that the Board of Trade has not established error in the decision.

3. The Baltimore and Virginia parties take issue with the Board's finding that the differences in rates as between the various gateways should be directly related to the differences in distance between the gateways and points in Europe, contending that the finding discriminates against Baltimore and Washington in favor of New York. In support of this contention, they argue that since only direct costs increase with miles flown, it is improper for the Board to adopt completely mileage-rated transatlantic rates which recognize indirect costs on a per-mile basis also. Baltimore concludes that "[s]ince only 55% of the North Atlantic air freight rate is accounted for by costs which vary by mileage . . . [a mileage-based rate structure] would be discriminatory . . . to Baltimore shippers . . ."[3]

The Bureau agrees that a mileage-oriented rate structure is preferential, but believes that the resulting preference is not undue. Pan American, in its answer, opposes the Baltimore position and argues instead that a mileage-based rate formula is a reasonable method of allocating both direct and indrect costs to various airline operations. TWA also urges rejection of the Baltimore and Virginia positions. TWA's position is that since not all service between Baltimore and Washington and points in Europe will be nonstop, and further since not all traffic will move direct, additional handling and other non-mileage costs must be recovered by the rate applicable to these points, and the Board's formula accomplishes this in a reasonable manner. TWA additionally contends that although the record may not be adequate for costing operations at the various gateways, there is sufficient evidence that rates reflecting all costs for services to Baltimore and Washington would be higher than under the Board's formula.

We find that the Baltimore and Virginia petitions do not establish error in our decision to order equalization of the

[3] Baltimore petition at p. 9.

per-miles rates between U.S. gateways and points in Europe as a reasonable means of eliminating the unlawful preference accorded the New York gateway under the existing rate structure. To begin with, the Baltimore and Virginia petitions are based upon two underlying assumptions: first, that indirect costs do not vary with mileage; and second, that direct operating costs are proportionate to the miles flown. However, neither of these assumptions is supported by the record. In the first place, some indirect costs do increase with mileage,[4] and second, although several carriers did stipulate that direct aircraft operating costs are proportionate to miles flown, TWA did not so stipulate, and introduced evidence tending to show that for the stage lengths involved direct operating costs per available ton mile increase as the distance increases.[5] Thus, the Baltimore and Virginia position is based on assumptions which cannot be substantiated by the record, nor does the record contain evidence upon which we could predicate a cost taper formula. On balance, it is our judgment that a uniform rate per mile is the most reasonable rate structure taking into account all of the evidence of record, and we cannot find that the petitions establish error in our

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[4] In general, indirect costs do tend not to vary with mileage. However, in allocating various system indirect costs to individual flight operations, certain of these costs are nonetheless generally considered to be related to miles, hours or revenues. These costs include advertising and publicity, reservations and sales, the control portion of aircraft servicing and the appropriate part of general administrative expenses allocable to each of these other categories. As such, contrary to the underlying assumption of the petitions, the amount of indirect costs allocated to individual operations will increase as the length of haul increases.

[5] TWA used this evidence in support of the per-mile disparities in the existing rates at the various gateways. The Board found, however, that the claimed cost increases shown in the exhibit did not justify the existing rate disparities because, *inter alia*, the exhibit failed to include the effect of indirect costs on the average cost per unit.

mileage formula or that such formula causes undue prejudice to Baltimore or Washington vis-a-vis New York.

4. The Baltimore and Virginia petitions also seek reconsideration of the Board's decision to use shortest operated mileage as the basis for computing rates to gateways other than New York. These parties argue that great circle mileage should be used because otherwise the carriers can discriminate against a particular gateway simply by refusing to offer any direct services to that point. Baltimore additionally opposes use of operated mileages because rates will fluctuate as service patterns change. Virginia argues that, if great circle mileage is rejected, then the shortest authorized mileage should be used so that carriers would not have control over rates through the service pattern offered. The answers of the Bureau and the carriers oppose use of great circle mileages. Pan American argues that great circle mileage is a hypothetical mileage not necessarily related to actual flight operations, and that if rates are to be reasonably related to costs, actual operated mileages not hypothetical mileages should be used. TWA argues that shortest operated mileages are the same or virtually the same as shortest authorized or great circle mileages, and that the Board's use of shortest operated mileages produces an equitable result.

We cannot find that the petitions establish error in our decision to base rates to gateways other than New York on the shortest operated mileages. In most cases, there is little difference between shortest operated and great circle mileages and the trend is toward a decrease in the differences. As Bureau Counsel points out, shortest operated mileages as reflected in the IATA Mileage Manual are now used for all rate making puporses. The basis employed is more consistent with cost than is great circle mileage, and in the absence of any compelling circumstances, constitutes the preferable approach. In sum, we cannot find that use of such mileages unduly prefers or prejudices any gateway.

5. Baltimore also questions the Board's finding that the cities of Baltimore and Washington may be common-rated on the basis of the arithmetic average of the Baltimore-European point and Washington-European point mileages. The Baltimore petition contends that the base mileage to be used for the purpose of providing a common-rate to these points should be the mileage to Baltimore in order to prevent creation of a new discrimination against Baltimore area shippers. None of the other municipal or carrier parties has responded to this aspect of Baltimore's petition.

Upon consideration, we are of the opinion that using mid-point mileage as a basis for common-rating Baltimore and Washington is reasonable and non-discriminatory, and the Baltimore petition fails to establish error in that decision. In view of the close geographic proximity of the two cities, the virtual overlap of the service areas of their respective international airports, and the fact that Friendship Airport serves both cities, a common-rate is virtually essential, and in fact the two points are common-rated in most markets. Use of midpoint mileages as a base for the common-rate represents a fair balancing of the interests of shippers in both cities, and the carriers serving these points. If the mileage to Baltimore were used, carriers would be forced to absorb the additional costs of serving Washington through Dulles airport. On the other hand, use of Dulles' mileages would force Baltimore shippers to pay a higher rate than they would absent the common-rates. Mid-point mileage reduces the economic disadvantage to the carrier for serving Dulles. On this basis, we do not believe that use of mid-point mileages discriminates against Baltimore shippers.

6. In addition to the issues already discussed, the Baltimore and Virginia petitions seek clarification of our decision and order in this proceeding in several respects. The Virginia parties contend that the order prohibits car-

riers from establishing a rate to Dulles without first adopting a rate to New York, and further that the order prevents carriers from establishing rates to Dulles lower than or equal to the New York rate where it would be economically justified for a carrier to do so. Contending that the order would cause a discrimination against Dulles shippers, the petition requests the Board to clarify the order to make it clear that common-rates or lower rates to Dulles than New York are acceptable where justified by the demands of trade and commerce or by costs. The Baltimore and Virginia parties also believe that the order in this proceeding should require the carriers to publish in their tariffs all of the specific rates applicable to the gateways other than New York in order to provide the shipping public clear and concise information regarding the rates available. Additionally, both petitions request that the order be amended to permit rounding up of fractional rates only when the fraction exceeds one half cent. Both parties also argue that the Board should require that domestic rates be combinable with transatlantic rates in constructing through rates to non-gateway points. As a final matter, the Virginia petition argues that in order to assure more equitable rates at interior points, shippers should be permitted to propose rates directly to IATA rate committees. The petition further urges the Board to declare that IATA rejections of such proposed rates are agreements among carriers which are required to be filed for Board approval and that, in the absence of adequate justification, such agreements will not be approved.[6]

In general, the carriers' answers oppose these requests for clarification. With respect to publication of all rates for each of the gateway cities, the carriers argue that while tariffs must of course be clear and concise, separate publication of rates for each point is neither necessary nor desirable. Since there are potentially thousands of rates

[6] See n.8, p. 17, *infra*.

involved, the carriers argue that separate publication of each individual rate would make tariffs unduly cumbersome and would be prohibitively expensive. The carriers seek freedom to analyze alternative methods of tariff publication, and argue against the Board's attempting to prescribe specifically what must be contained in tariffs.

The Bureau supports the civic parties' requests in the following respects. The Bureau believes that the Board should state in the order, as was done in the opinion, "that the existing preference and prejudice ought to be removed by requiring respondent carriers to file tariffs providing rates equal on a per-mile basis, . . ., to and from all gateway points at issue in this proceeding, and points in Europe." The Bureau does not believe that the Board should prescribe the tariff format to be used for filing North Atlantic cargo rates, but does urge that carriers be directed to establish and hold out rates to each city in accordance with existing tariff-filing regulations.

In adopting Order 73-2-24, we fully intended, as reflected by the text of the opinion, to require that all rates available at New York be available at other gateways on the basis set forth in finding number 4 of the ultimate findings and conclusions set forth in the opinion. To insure that this intention is fully understood and complied with, we have detemined to amend the order to so state. We do not, however, find it necessary to determine the manner in which the carriers must comply. Obviously, tariffs filed to conform with our decision in this proceeding must do just that. However, beyond those requirements set forth in Part 221 of the Economic Regulations (14 CFR Part 221), we find nothing in the Baltimore and Virginia petitions that warrants imposing additional restrictions on the carriers with respect to the manner of filing those tariffs.

With respect to the request that we provide for the specific manner of rounding off, the Board has determined not to impose a specific requirement in this respect in the

interest of avoiding undue rigidity. We would expect that to the extent that rounding is employed, it shall be accomplished on a uniform, equitable non-discriminatory basis.

On the question of the combinability of domestic rates with transatlantic rates, as we indicated in the opinion, we will await the filings of new tariffs or agreements and their accompanying justification prior to deciding the validity of the rate structure employed to non gateway points. Nothing in the Baltimore and Virginia petitions indicates any reason to alter this approach.[7]

7. The final matter raised in the civic parties' petitions and answers are requests for service of various tariff filings and cost justifications submitted by the IATA carriers to the Board. Specifically, the Philadelphia parties have petitioned for an amendment of paragraph 5 on page 33 of Order 73-2-24 to require that the carriers serve the civic parties with any proposals and cost justifications submitted as a result of said order which embody differentials in the minimum charges applicable at any of the gateways. The Memphis parties in their answer support Philadelphia's petition and also seek to require service upon them by the carriers of any proposed differentials in the minimum charges as between interior gateways, on the one hand, and Memphis or other interior non-gateway cities, on the other. In support of its petition, Memphis states that the Board's expressed expectation that IATA agreements or carrier tariff filings providing differentials in the minimum charges as between interior gateways and interior non-gateway cities will be accompanied by adequate cost justifications requires service of these agreements or tariffs together with the justification upon Memphis as a party to this case. Memphis also urges that the carriers serve upon

[7] With respect to the Virginia parties' contention that the order precludes lower per-mile rates to Dulles than to New York even if economically justified, we note that carriers are always free to justify departures from the mileage formula.

all parties to this proceeding agreements and tariffs with justifications with respect to the overall rate structure to Memphis and other non-gateway interior points. Similar requests are also made by the Baltimore and Virginia parties. The Port Authority's answer indicates that if these petitions are granted, it also wishes to be served with such cost justifications.

In general, the carriers oppose these requests. TWA asserts that such a request is the proper subject only in a rule making petition and was not an issue in this proceeding. TWA offers, however, to make reasonable efforts to make available to the civic parties any appropriate document upon request, but argues that to require service would be unduly burdensome. Pan American takes the position that service of the tariffs, agreements, and cost justifications is unnecessary because this case is over, and in any event service is also unnecessary since these documents are available for public inspection at the Board's offices. The Bureau takes the position that this issue involves IATA conference procedural matters which were not at issue in this proceeding, and that these requests should, therefore, be denied.

Upon consideration, we find that we are in agreement with the civic parties. Contrary to the contention of Pan American, this proceeding is not yet completed, and will not be until such time as the carriers file tariffs conforming to our decision. In this regard, we have deferred until the time such tariffs are filed, resolution of several of the issues litigated in this proceeding—namely, the question of the appropriate minimum charge structure at the various gateways, and the question of through rates from interior points to Europe via each of the gateways. For this reason, we find that the civic parties are entitled to be served with copies of the agreements or tariffs filed by the carriers in order to comply with our decision and also with the accompanying justifications for such agree-

ments and tariffs. With respect to TWA's and the Bureau's argument that IATA procedural matters were not at issue in this proceeding, we do not understand the civic parties to be raising a general question regarding all subsequent IATA rate filings, but rather to be seeking only those documents to be filed in response to our decision in this proceeding.[8]

We have considered all of the remaining matters raised by the petitions and answers, and we find that they have either been adequately treated in our previous opinion or are without merit.

ACCORDINGLY, IT IS ORDERED THAT:

1. Paragraph 2 of Order 73-2-24, dated February 6, 1973, be and it hereby is amended to read as follows:

> "2. The air carrier and foreign air carrier parties adhering to or participating in the local or joint tariffs listed in the appendix shall discontinue demanding, charging, collecting, or receiving such preferential and prejudicial rates and amend their local and joint tariffs to conform with paragraphs 1, 4, and 5 of the ultimate findings and conclusions appearing on pages 31, 32, and 33 of the opinion attached hereto effective on or before September 30, 1973, on not less t' .n 30 days' notice: *Provided, however,* That instead of canceling said tariffs, the carriers may modify their tariffs to conform with the decision herein;"

2. Finding number 4 of the Ultimate Findings and Conclusions appearing on page 32 of Order 73-2-24, February 6, 1973, be and it hereby is amended to read as follows:

> "4. The lawful local and joint North Atlantic general commodity, specific commodity and container rates for

[8] With respect to the Virginia parties' request that interior point shippers be authorized to propose rates directly to IATA rate committees and that the failure of the IATA carriers to implement a rate request be considered an agreement among carriers pursuant to section 412 of the Act, such request is outside the scope of this proceeding and will, therefore, be denied.

service between the cities of Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago, on the one hand, and points in Europe, on the other hand, are the New York-European point rates per mile multiplied by the distance in miles between such cities and the point in Europe. The air carrier and foreign air carrier parties participating in air cargo services for through transportation of cargo between each of the cities named above and points in Europe via the North Atlantic shall establish and hold out in lawfully filed tariffs all rates available at New York at each of the other named gateways based upon the above formula. The mileage to be used in determining the lawful rates is the shortest operated point-to-point mileage as shown in the latest edition of the IATA mileage manual: *Provided, however,* That such rates between Baltimore and Washington, on the one hand, and points in Europe, on the other hand, may be common-rated on the basis of the arithmetic average of the Baltimore-European point and Washington-European point mileages; *And, provided further,* That such rates between the various U.S. gateway points mentioned above, on the one hand, and points in Europe currently common-rated, on the other hand, may continue to be common-rated based upon the lowest rate resulting from application of the above formula."

3. Paragraph 5 of the Ultimate Findings and Conclusions appearing on page 33 of Order 73-2-24, February 6, 1973, be and it hereby is amended to read as follows:

"5. The record does not afford an adequate basis for determining the lawful relationship between the minimum charges applicable at the various gateway cities party to this proceeding. Any proposal embodying differentials in the minimum charges between any of the gateway cities shall be accompanied by adequate cost justification. Any agreement or carrier tariff filed in response to the decision herein embodying any such differentials and the accompanying cost justification shall be served on the civic parties to this proceeding."

4. Finding 6 of the Ultimate Findings and Conclusions appearing on page 33 of Order 73-2-24, February 6, 1973, be and it hereby is amended to read as follows:

> "6. The lawful cargo rates between Memphis and other non-gateway cities, on the one hand, and points in Europe, on the other hand, are beyond the scope of this proceeding. The question of the lawful rates and charges between Memphis and other non-gateway interior cities and points in Europe will be considered in determining the lawfulness of the new agreements and tariffs required to be filed herein. Copies of these agreements and tariffs and accompanying justifications shall be served upon the civic parties to this proceeding."

5. Except to the extent granted herein, the petitions for reconsideration and/or clarification of Order 73-2-24 are hereby denied.

TIMM, Chairman, GILLILLAND, Vice Chairman, MINETTI and MURPHY, Members, concurred in the above opinion and order.

EDWIN Z. HOLLAND
Secretary

(SEAL)

APPENDIX C

Constitution of the United States

Article I, section 9, clause 6.

> "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; * * *"

Federal Aviation Act of 1958

SEC. 102. [49 U.S.C. 1302]

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity . . .
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

SEC. 402 [49 U.S.C. 1372]

> (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.
>
> (b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the Rules, Regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

SEC. 404 [49 U.S.C. 1374] * * *

Discrimination

> "(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or

advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 1002. [49 U.S.C. 1482]

Removal of Discrimination in Foreign Air Transportation

"(f) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air tansportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice."

INTERSTATE COMMERCE ACT—PART I

"Sec. 3. [49 U.S.C. 3] *Undue preferences or prejudicies prohibited*

"par. (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to sub-

ject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Feb. 4, 1887, c. 104, Pt. I, § 3, 24 Stat. 380; Feb. 28, 1920, c. 91 § 405, 41 Stat. 479; Aug. 9, 1935, c. 498 § 1, 49 Stat. 543; Aug. 12, 1935, c. 509, 49 Stat. 607, Sept. 18, 1940, c. 722 Title I, § 5(a), 54 Stat. 902."

INTERSTATE COMMERCE ACT—PART II

"Sec. 216. [49 U.S.C. 216] *Undue preferences or prejudices prohibited*

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Shipping Act of 1916

Section 16, 46 U.S.C. 815

815. Discriminatory acts prohibited—Penalties.—It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this Act either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsover.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more

than $5,000 for each offense. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734; June 16, 1930, c. 581, 49 Stat. 1518).

Convention of International Civil Aviation

(61 Stat. 1180)

ARTICLE 6

No scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization.

Bilateral Air Transport Agreement Between the Government of the United Kingdom and the Government of the United States of America Relating to Air Services Between Their Respective Territories

ARTICLE 2

(2) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the contracting party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No.

THE COMMONWEALTH OF VIRGINIA, *Petitioner,*

v.

THE CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, The Commonwealth of Virginia * (Virginia), respectfully prays that the Court issue a writ of certiorari to review the Judgment and opinion of the Court of Appeals for the Fourth Circuit entered in this proceeding on June 6, 1974 in which that court affirmed orders of the Civil Aeronautics Board.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The orders of the Civil Aeronautics Board appealed from are No. 73-2-24, dated February 6, 1973; 73-7-9, dated July 5, 1973 and also appear in the appendix.

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* The petition is joined in by the intervenor below, the Metropolitan Washington Board of Trade.

JURISDICTION

The judgment of the United States Court of Appeals was entered June 6, 1974, affirming the orders of the Civil Aeronautics Board dated February 6, 1973 and July 5, 1973.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(i).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board (Board), having found that the existing Transatlantic cargo rate structure unduly preferred New York and prejudiced Washington (Dulles International Airport) in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. 1374(b), should have removed the unlawful preference and prejudice and protected the competitive interests of ports and shippers by equalizing the rates at those competing ports?

2. If the Board rejects the remedy of equalizing rates at competitive ports, and bases the remedial rates on a formula based on the miles of transportation received, does this remove the unlawful preference and prejudice when New York shippers continue to receive the same or more miles of air service as Dulles shippers, but pay a lesser charge?

3. Having found that the cargo rates are unlawfully preferential and prejudicial may the Board justify its failure to remedy the unlawful preference and prejudice as required by statute on the ground that the moving cause of the discrimination against United States ports and shippers is the insistance of foreign governments?

STATUTES, TREATIES AND AGREEMENTS INVOLVED

Federal Aviation Act of 1958, Sections 102(c) (49 U.S.C. 1302(c)), 402 (49 U.S.C. 1372), 404(b) (49 U.S.C. 1374(b)), 412 (49 U.S.C. 1382), 414 (49 U.S.C. 1384) and 1002(f) (49 U.S.C. 1482(f)).

Interstate Commerce Act, Sections 3(1), 49 U.S.C. 3(1)

Shipping Act of 1916, Section 16 First, 46 U.S.C. 815 First

Convention on International Civil Aviation, 61 Stat. 180 (1947) Article 6.

Bermuda Agreement, 60 Stat. 1499, TIA 5253 (1946), Article 2(2).

The above are set forth in the Appendix.

STATEMENT OF THE CASE

This proceeding arose out of an investigation conducted by the Civil Aeronautics Board (CAB) between 1969 and early 1973 to determine whether the transatlantic air cargo rates unduly preferred New York and unduly prejudiced competing gateways, particularly Washington (Dulles International Airport).

International air fares and rates are generally established by agreement among the carriers through the International Air Transport Association (IATA) as described by the District of Columbia Circuit in *National Air Carrier Ass'n* v. *C.A.B.*, 141 U.S. App. D.C. 31, 436 F.2d 185, 186 (1970):

> The International Air Transport Association (IATA) is a trade organization of domestic and foreign air carriers which are engaged in scheduled international air transportation. The member carriers periodically meet in 'traffic conferences'

to take joint action on matters of mutual concern, including types of fares offered to the public. These agreements, which take the form of resolutions, are subject to approval by the parent nations of the member carriers; in this country, the Civil Aeronautics Board has long asserted jurisdiction over IATA resolutions under Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382 (1964). See generally IATA Traffic Conference Resolution, 6 C.A.B. 699 (1946). The Board's approval of an IATA resolution confers antitrust immunity by virtue of Section 414 of the Act, 49 U.S.C. § 1384 (1964). The rates contemplated by the agreements are then embodied in tariffs which are filed with the Board pursuant to 49 U.S.C. § 1373 (1964).

Under this procedure common rates for air cargo between competitive ports are widely accepted. For instance, New York's rates to European Ports are the same as Montreal's rates to the same destination although as aircraft operate across the Atlantic, New York is about 200 miles farther from European points than is Montreal (Bds. Op. App. p. 91a). Many cargo rates between New York and Copenhagen, Frankfurt, Geneva, Milan and Rome are common rated, although Rome is 400 miles farther from New York than Copenhagen. Similarly, New York's rates to Central and South American ports are common rated with Dulles, favoring New York which is approximately 200 miles farther than Dulles from some of those points. Cargo rates from Los Angeles to Tokyo and Far Eastern Ports are common rated with Seattle to the same points although Los Angeles is approximately 957 miles farther from these points.[1]

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[1] International Air Traffic Tariffs Corporation Agent, C.A.B. 259, October 1, 1973.

During the investigation of the instant transatlantic IATA cargo rates, the Administrative Law Judge found that the transatlantic air cargo rate structure is unduly preferential to New York and unduly prejudicial to Dulles in violation of Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1374(b)). (app. 136-7)

The CAB summarized the Judge's findings as follows:

> Judge Cusick found that the North Atlantic cargo rate structure unduly prefers New York and unduly prejudices Boston, Philadelphia, Baltimore, Washington, Cleveland, Detroit, and Chicago. These findings were based on the following facts. First, for almost every SCR* and at most weight breaks, *the rate per mile for New York Shipments is generally lower* than the equivalent rate per mile available for shipments to or from any of the other cities. Second, *A substantial volume of North Atlantic cargo moves to New York* from all over the United States via truck, apparently for reasons of price expediency. Third, a widespread system of common-rating exists on the European side of the Atlantic, and this practice adversely affects U.S. *shippers outside of New York who are required to pay more than New York area shippers to transport similar items shorter distances.* Finally, for those European cities beyond London for which add-ons exist, *the amounts of such add-ons are substantially less than the add-ons that exist in this country* for similar distances beyond New York. Judge Cusick concluded that the rate structure has increased New York's predominance as a gateway for cargo shipments to Europe beyond what it might otherwise be, and

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* Specific Commodity Rate.

has depressed the utilization of other U.S. gateways below what would be expected from the cargo potential available and the quality of those facilities. Upon a review of the record, we find that we agree with these conclusions.[2] (Emphasis added)

The Board agreed with the Administrative Law Judge that the preference for New York and prejudice to Dulles was undue and unlawful. "None of the parties contest the correctness nor the lawfulness of this conclusion." (Court Op. app. 4a)

The controversy in the case relates to the method selected to remove the preference and prejudice as directed by Section 1002(f) of the Federal Aviation Act (49 U.S.C. 1482(f)). The Administrative Law Judge ruled that the rates between the competing U.S. gateway cities on the East Coast (Boston, New York, Philadelphia, Baltimore and Washington) and Europe should be common rated. The Board, however, rejected this remedy and prescribed instead a formula by which the New York-European point rate per mile is multiplied by the mileage between the U.S. gateways, such as Dulles, and the point in Europe.

The Board's decision was appealed to the Court of Appeals for the Fourth Circuit pursuant to 49 U.S.C. 1486, and the Court affirmed the Board's decision.

The court and the Board rejected the contention by Petitioners below that decisions by administrative agencies and the courts under identical statutes in rail and ocean transportation, 49 U.S.C. 3(1); and 46

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[2] CAB Order No. 73-2-24, App. p. 93a.

U.S.C. 815 First, required that Dulles and New York, as competitive ports, be common rated. Petitioners relied on *Boston and Maine RR* v. *U.S.*, 202 F. *Supp.* 830 (1962), Affd. by an equally divided Court, 373 U.S. 372 (1963), Reh. Den. 374 U.S. 859; *Atchison, T & SF Ry. Co.* v. *U.S.*, 231 F. *Supp.* 422 (1964); Affirming *Brazos River Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); *Nueces County Navigation Dist., No. 1* v. *Atchison, T. & S.F. Ry.*, 325 ICC 400 (1965), *Affd. sub nom. City of Galveston* v. *U.S.*, 257 *F. Supp.* 243 (1966), Affd. Mem. 386 U.S. 269 (1967); *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961), Affd. *per curiam sub nom. Alabama T. & N.P. Co.* v. *U.S.*, 207 F. *Supp.* 638 (1962).

The Court's rational was that (1) Major costs of air transportation tend to vary with miles flown more than is true in surface transport and (2) the CAB has broader discretion than the I.C.C. to require that differences in distances be reflected in differences in rates and (3) if Dulles were common rated with New York on rates to Europe, New York would be denied the natural (and economic) advantages of its geographic location. (App. pp. 8a, 10a.)

The court also rejected the contention that to refuse to common rate Dulles with New York was inconsistent with widespread practice in air transportation since *all the rates under investigation* were and are common rated between New York and Montreal although New York is 200 miles farther from Europe. All the transatlantic rates were common rated between some points in Europe. All the rates across the Pacific are common rated between two or more cities on the West Coast; and even to Central and So. America, New York is common rated with Dulles, even though Dulles

has a distance advantage to some cities of 200 miles.[3] By these common rates Dulles has been denied the natural and Economic advantage of its geographic proximity to Central and South American ports.

The Court supported its position by stating:

> Nearly all domestic rates and fares reflect distance and among domestic points common-rating is rare.[4] The majority of rates for international transportation is not common-rated. (App. p. 9a.)

The Court did recognize that some air transport rates were common rated, but justified those ". . . because of the need for cooperation and agreement among nations engaged in air transportation", (App. p. 9a) and because "There is common-rating of points in Europe, usually at the instance of European governments, and this is a matter beyond the regulation or control of the Board."[5] (App. p. 9a.)

Although the Court approved the Board's "mileage based" formula, it recognized that the formula did not

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[3] Since the Board's decision in this proceeding it has reaffirmed air cargo rates across the Pacific which equalize rates between Los Angeles and points in the Far East with the rates of Seattle to Tokyo although Los Angeles is over 900 miles farther from the oriental point than is Seattle. CAB Order 73-12-77 dated December 19, 1973. The CAB has also stayed the effect of the challenged orders to allow more cities in Europe to be common rated to U.S. points than would be allowed by application of its formula. CAB Order 74-8-54 dated August 13, 1974.

[4] Domestic air cargo rates had not been discussed by the Board in its decisions. The Board's counsel had used this reasoning in its brief to the Court.

[5] The Record does not contain objections by foreign governments to common rating nor did the Board make such findings. Such rationalizations were made by Board counsel on brief to the Court. See Brief of the Board to the Court below, pp. 42, 43, 44 and 45.

give Dulles shippers as much transport mileage as New York shippers

> Virginia points out that N.Y. shippers get 4,004 miles of air transportation to Milan, Italy, for 78 centers per pound; but for 3,646 miles of air transportation to London—almost 400 miles less—Dulles shippers are charged 79 cents per pound.[6]

The fact is that the new rates are lower for New York shippers than for Dulles shippers *in every mileage category;* see Table I, yet the court held that this difference in rate per mile did not constitute an unlawful preference for New York because:

> . . . The fact is that to any *particular* European city the mileage rate from New York or any other United States gateway city is precisely the same, and, hence, there is neither preference to New York nor discrimination against the other United States gateway cities. (Op. p. 16)

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[6] The court cited this example at Page App. 12a of the Memo opinion. The disparity is even more pronounced as relates to Rome. The rate $.95 per lb. applies to New York-Rome (4,280 miles). The Dulles Rate to Rome, for 3,646 miles is $.96 per lb. So the New York shipper gets more than 600 miles more transport than the Dulles shipper, and pays less. The rate disparities have been increased since the original Order in February of 1973, by amendments which approve disparities on the sole basis of origin of the traffic. The American shipper is charged a higher rate for service to a European port, than the European shipper at that port is charged for service to the U.S. For identical mileage, the U.S. shipper must pay more.

TABLE I

RATES DIFFER FOR COMPARABLE MILEAGE

GENERAL COMMODITY 220 POUND CAB PRESCRIBED RATES

Mileage Block	Dulles/ Balt/Wash	New York	Chicago	Cleveland	Detroit	Philadelphia
3200-3299	Shannon	Glasgow				Dublin
Miles [1]	3270	3207				3290
220 lb Rate [2]	92	91				90
3400-3499	Glasgow	London		Glasgow	Shannon	Lisbon
Miles [1]	3402	3456		3479	3477	3455
220 lb. Rate [2]	96	91		99	89	93
3600-3699	London	Brussels	Shannon		Edinburgh	Madrid
Miles [1]	3646	3662	3621		3621	3677
220 lb. Rate [2]	96	93	101		94	95
3800-3899	Oslo	Hamburg			Lisbon	Hamburg
Miles [1]	3866	3801			3807	3895
220 lb. Rate [2]	103	95			93	97
4000-4099	Bergen	Munich	Lisbon	Oslo	Madrid	Berlin
Miles [1]	4061	4030	4001	4087	4054	4058
220 lb. Rate [2]	103	96	106	105	96	98
4200-4299	Munich	Rome	Dusseldorf	Bergen	Malmo	
Miles [1]	4227	4280	4220	4275	4225	
220 lb. Rate [2]	101	95	106	105	98	

[1] IATA shortest operated mileage

[2] CAB prescribed rates rounded to nearest cent

SOURCE: IATA Mileage Manual, Air Tariff Corporation CAB 26 and CAB prescribed rate formula.

The Court's decision was issued on June 6, 1974 and this petition is filed on September 4, 1974.

REASONS FOR GRANTING THE WRIT

1. THE REFUSAL TO COMMON RATE THE TRANSATLANTIC AIR CARGO RATES AT DULLES WITH THOSE AT NEW YORK IS THE FIRST JUDICIAL INTERPRETATION OF THIS SECTION OF THE FEDERAL AVIATION ACT AND IS IN CONFLICT WITH ITS PURPOSE.

The decision of the Court below conflicts with the decision of this court in *Boston & Maine Railroad* v. *U.S.*, 373 U.S. 372 (1963), decided by an equally divided court, Reh. Den. 374 U.S. 859, which approved the decision in *Boston and Maine Railroad* v. *U.S.*, 202 F. Supp. 830 (1962). That case required the rates between competing ports to be common rated to protect the competitive opportunities of East Coast ports for transatlantic shipments. The policy and purpose of the anti-discrimination statute and the 1935 amendment was stated by the lower court to be:

> One of the purposes of the 1935 amendment to Section 3 was, as the Commission had previously pointed out, *Equalization of Rates, (At North Atlantic Ports,* 311 ICC 689 (1959)), *supra.* at 716 and cities therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious. (*Id.* at 837)

Moreover, other decisions [7] of the 1960's overwhelm-

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[7] *Atchison, T. &S.F. Ry. Co.* v. *U.S.*, 231 F. Supp., 422 (1964); affirming *Brazos River Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); *Nueces County Navigation Dist., No. 1* v. *Atchison,* T.&S.F. Ry., 325 I.C.C. 400 (1965), *Affd. sub nom. City of Galveston* v. *U.S.*, 257 F. Supp. 243 (1966), Affd. Mem. 386 U.S. 269 (1967); *Hillsborough County Port Authority* v. *Annapee & W. Ry.*, 313 I.C.C. 691 (1961), Affd. *per curiam sub nom. Alabama T. & N.P. Co.* v. *U.S.*, 207 F. Supp. 638 (1962).

ingly establish the principle that export and import rates strictly tailored to transportation costs are not permissible under the existing law if they unduly restrict port competition.[8] The factor of distance, and hence costs, is but one of several factors to be considered, as both the Commission and the courts indicated.[9]

The court cites decisions by this court [10] and the Interstate Commerce Commission [11] in support of the view that the anti-discrimination provisions were not intended "to deprive a locality of the natural advantages of its geographic location." (App. 10a). The decisions of this court cited were not "port" cases. In spite of that, *U.S.* v. *Illinois Cent. Ry.*, 263 U.S. 515 (1924), approved equal rates for competitive points. In any event, the decisions protecting geographic proximity do not support the decision in this case where the rates approved favor New York when New York has

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[8] The Board has prescribed equal rates for two U.S. ports for the International Carriage of mail. Between San Francisco and Seattle and Tokyo, the rates were equalized although one carrier's operation involved 1500 more miles of air transport service, on the ground that carrier costs are not the sole determinant of rates. *Pacific Service Rate Case*, 24 CAB 629 (1957), Affd. *sub nom. Pan Am.* v. *CAB*, 256 F. 2d 711 (C.A.D.C. 1958), *Cert. Den.* 358 U.S. 836 (1958).

[9] Leonard S. Goodman, Assoc. Gen. Counsel, Interstate Commerce Commission, *Recent Trends in Transport Regulation.* 70 Mich. L. Rev. 1223, 1249 (1972).

[10] *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924); *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216 (1951).

[11] *Board of Trade* v. *Ill. Cent. R. Co.*, 344 I.C.C. 818 (1973); *Canaveral Port Authority* v. *Ahnapee & W. Ry. Co.*, 337 I.C.C. 681 (1970); *Maritime Association, Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 537 (1925).

geographic advantages with respect to Europe, but again favor New York when Dulles has the geographic advantages with respect to Central and South America.

The court and the Board's focus on the costs of the carriers, misapprehended the purpose of the anti-discrimination statutes. (Op. App. 8a, 10a) The protection sought was not for carriers, but for shippers. The decision clearly conflicts in principle with that of other circuits that Section 404(b) protects *shippers,* and not carriers: The D.C. Circuit has stated, "That section (Sec. 404(b)) exists to protect *shippers,* not carriers. Cf. *I.C.C.* v. *B & O Rwy.,* 145 U.S. 263, 281 (1892)". *Flying Tiger Line, Inc.* v. *C.A.B.,* 350 F.2d 462, 465 (1965) (Emphasis in original)

This court should review the application of Sec. 404(b) to air transportation of cargo to provide the necessary guidance as to whether the congressional intent to protect ports and shippers is carried out.

2. THE FORMULA APPROVED FOR REMOVING THE PREFERENCE FOR NEW YORK AND FOR PREJUDICE TO DULLES, BASED ON A PURPORTED "MILES OF SERVICE" PRINCIPLE, SHOULD NOT APPLY TO PORT CITIES, IS INCONSISTENT WITH THE BASIC PRINCIPLES OF SPECIFIC COMMODITY RATE MAKING AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The court below held that the unlawful preference for New York and prejudice to Washington-Baltimore was removed by the new rates because they were based on "mileage" (the miles of service performed). (App. p. 8a) This conflicts with the principle generally applicable to port cities, and the practices of the carriers and the Board in international rate making. In transatlantic cargo transportation 65 per cent to 80 per cent of the movement is under specific commodity rates.

The carriers themselves do not even list distance as a factor in determining the level of these rates. (Exh. No. PA-9 p. 6) The Board has ruled that distance is only one of many factors in determining specific commodity rates. *Theodore Manufacturing Co.*, Order No. E 22710, dated September 30, 1965. See Pacific Service Rate case, 24 CAB 629, *supra*, footnote 8, where the Board refused to apply distance as the determining factor in mail rates.

The decision of the court below not only approves the Board's novel mileage formula, but appears to disapprove further common rating by the Board which would deprive any ports of ". . . the economic advantage of their geographic locations." (Op. App. p. 10a) The Board continues to approve common rating between far eastern points such as Tokyo and Seattle and Los Angeles although Los Angeles is more than 900 miles farther from Tokyo than is Seattle (Order No. 73-12-77 dated December 19, 1973) and also continues to common rate New York with Dulles to So. American ports when Dulles has an approximate 200 mile advantage (Order No. 74-1-130 dated January 29, 1974).) By these decisions the Board denies ports the advantage of geographic location.

The so-called "mileage" formula prescribed is not even what it purports to be. The rates give New York shippers more miles of service for the same or lower rates than Dulles shippers. At App. p. 12a of its Opinion the Court states:

> Virginia points out that New York shippers get 4,004 miles of air transportation to Milan, Italy, for 78 cents per pound; but for 3,646 miles of air transportation to London—almost 400 miles less—

Dulles airport shippers must pay 79 cents per pound.[12]

Such a result is contrary to and in conflict with the decision by this court in *New York* v. *U.S.*, 331 U.S. 284 (1947). That case unambiguously held that the charge of a higher rate to one shipper than another for an equal number of miles of transportation constitutes discrimination. When shippers at cities in the Southern Region were charged higher rates than shippers in cities in official territory for equal mileage, discrimination was established. *Id.* at 302-303.

That case did not involve port rates, but rather rates between domestic points. The decision is relevant here because the Board and the court relied extensivly, if not exclusively, on "miles flown" as the criterion for

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[12] Since its original order in this proceeding the Board has amended its order to approve a lower rate for shipments originating in Europe to a U.S. point than is charged a U.S. shipper to the same European point in the opposite direction. For identical mileage, the American shipper must pay a higher charge—a rate disparity based solely on point of origin. (Order 74-8-54 dated August 13, 1974.)

This disparity was not argued before the Court below. The courts reasoning was that, as long as the mileage rate between New York and any *Particular* European city is precisely the same as the Dulles mileage rate, there is no preference for New York and discrimination against Dulles. This reasoning would also support a directional disparity. This view conflicts with all decisions found by Counsel. *Arkansas Plant Food Co.* v. *St. Louis So. Western Rwy. Co.*, 315 I.C.C. 680 (1962); *Republic of France* v. *Director General*, 68 I.C.C. 422 (1922); *Spreckles Savage Tire Co.* v. *A.T.&S.F. Ry. Co.*, 142 I.C.C. 507 (1928). In ocean transport, when the Maritime Commission initiated formal investigations on directional disparities, the carriers eliminated the disparities. 29 FED. REG. 3783 (1964) No. 1174 FMC, July 17, 1964. See "Rate Regulation In Ocean Shipping". 78 HLR 635, 644 (1965).

determining a proper rate relationship. Having resolved miles of service to be the determining factor of what the rate relationship should be, the Board should not in the same decision approve rates which *in every mileage bracket* (see Table I) give New York shippers more miles of air transport service for the same or a lesser rate than is charged the Dulles shippers.

It is contended that in order to provide the equal competitive opportunity provided by law, Dulles must be common rated with New York. If, however, the relation of the rates is based on miles of service such "mileage formula" should relate the rates to the miles performed in fact as well as in formula.[13] Dulles' rates should be lower where its location gives it shorter mileage. The present rates deny Dulles any competitive opportunity at all. They favor New York when it is nearer the foreign port and they favor New York when it is farther away.

3. THE COURT BELOW MISAPPREHENDED THE DISTINCTION BETWEEN THE LACK OF POWER TO PRESCRIBE RATES IN FOREIGN AIR TRANSPORTATION AND THE GRANT OF POWER TO REMOVE UNDUE PREFERENCE OR PREJUDICE IN FOREIGN RATES.

The decision involves important questions of first impression concerning the extent to which discrimination against American ports and shippers must be accepted on the ground that the American government must accommodate foreign interests.

The court justified the acceptance of rates granting New York shippers more miles of air transport serv-

[13] It is not theory but the impact of the rate ordered which counts. *FPC* v. *Hope Nat. Gas*, 320 U.S. 591, 602 (1944).

ice than the mileage given Dulles shippers for the same rate as follows:

> There is common-rating of points in Europe, usually at the instance of European governments, and this is a matter beyond the regulation or control of the Board.[14] (Op. App. p. 12a)

> "The Board has, nevertheless given approval to some international common-rating, but it has done so . . . because of the need for cooperation and agreement among nations . . ." (*Id.* App. p. 9a)

Common rating is not merely an internal European matter though. The rates are between European ports and U.S. ports. European governments insist on equal rates to the U.S. to prevent concentration of the cargo traffic in one European port[15] and to equalize competitive opportunities for the respective ports.

Congress has recognized that *levels* of international rates could be established only by cooperative action between sovereign states. For this reason Congress withheld the power to establish rates in both the Shipping Act of 1916 (46 U.S.C. 801, 815 First 1959) and in the Federal Aviation Act of 1958 (49 U.S.C. 1301, 1482(f)). Yet, in both Acts, Congress directed the

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[14] It should be noted that the record in this case contains *no objections by foreign governments* to equalize rates between Dulles and New York. Such a rational was presented by attorneys for the Board at pp. 42, 43, 44, 45 and 57 of their brief to the Court of Appeals. The Court's reliance on rational of counsel conflicts with the decision of this Court in *Burlington Truck Lines* v. *U.S.*, 371 156 (1962).

[15] The record before the CAB indicated that on the European side, no more than 29 percent of the transatlantic export-import traffic moved through one city, whereas in the U.S., more than 80 percent moved through New York.

agencies to prevent discrimination against American Ports and Shippers. See 46 U.S.C. 815 First (1959), and 49 U.S.C. Section 1482(f). It reaffirmed this posture as recently as 1972 by increasing the powers of the Board in international rate matters (P.L. 92-259, Sec. 3(a), 86 Stat. 96, March 22, 1972, 47 U.S.C. 1482(j).

The view that the Board is limited in its power to enforce American law prohibiting discrimination misapprehends the statute and conflicts with decisions by other circuits under Sec. 16, First of the Shipping Act of 1916, 39 Stat. 734 (46 U.S.C. Sec. 815 First). *Campagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663 (2d Cir. 1929), *cert. den.* 280 U.S. 555 (1929); *Stockton Port District* v. *Pacific Westbound Conf.*, 9 FMC 12 (1965), affd. 369 F.2d 380 (1966); *Pacific Far East Line* v. *U.S.*, 246 F.2d 71 (D.C. Cir. 1957).

The view that the Board must accept discrimination against U.S. ports and shippers would render meaningless the commitments by foreign governments in treaties [16] and executive agreements [17] to abide by the laws of the countries into which their carriers fly. Substantial questions of first impression are raised as to the construction and application of the Acts regulating air transportation, supported by treaties and executive agreements, which, although recognizing the lack of power in the U.S. to determine the level of rates, nevertheless affirm the power to remove unlawful

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[16] Sec. 6, Chicago Convention, 61 Stat. 1180. (App. 140a)

[17] 60 Stat, 1499, TIAS 253, sets out the Bermuda bilateral agreement which is the pattern for subsequent air transport bilaterals.

discrimination and prejudice.[18] The construction and application of traditional statutory language barring unlawful discrimination, preference and prejudice to the new mode of air transportation of cargo should be reviewed by this court.

While the volume of transatlantic air cargo is not as large as cargo moving on the surface, it has grown more than ten-fold between 1960 and 1973 from 46,129 tons (92,258,000 lbs.) to 505,181 tons, (1,010,362,000 lbs.) and will become increasingly important as the size of aircraft increases and the flying costs per ton mile decrease. Shippers, manufacturers and consumers will be affected in their choices of location and distribution if a cargo rate structure gives New York a lower rate to Europe than Dulles because New York has a slight distance advantage, but denies to Dulles a similar rate advantage to Central and South American ports when the tables are turned. Such a result seriously affects the economic development of the Commonwealth of Virginia and other states similarly situated. It would affect the investment by a state in airports such as Dulles as it restricts the competitive opportunities available to Dulles and becomes a critical issue in the plans of the Commonwealth.

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[18] The difficulty of regulating the *level* of international rates and fares has been recognized but it has generally been contended or assumed that the United States has power to prevent discriminatory rates. Note: "Rate Regulation In Ocean Shipping," 78 HLR 635 (1965).

CONCLUSION

For all of the foregoing reasons it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the Fourth Circuit herein.

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September 4, 1974

SUPREME COURT, U. S.

OCT 24

MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-233 and 74-234

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, COMMONWEALTH OF VIRGINIA,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

QUESTION PRESENTED

Whether the Civil Aeronautics Board exceeded its statutory authority or acted arbitrarily or unreasonably in prescribing equal per mile rates for North Atlantic gateway cities.

STATEMENT OF THE CASE

The proceeding which culminated in the Orders of the Civil Aeronautics Board (CAB), affirmed below, was initiated by complaints alleging that the North Atlantic cargo rate structure violated Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1374(b)). The rates, as established by agreements of the International Air Transport Association (IATA) and approved by the CAB, were alleged to unduly prefer New York and Boston, and unduly prejudice Baltimore and Washington, D.C.

The CAB instituted an investigation in response to the complaints[1] and an evidentiary hearing was held before CAB Administrative Law Judge William F. Cusick. The Judge found that the rates at issue were unlawful in that New York was unduly preferred and the interior gateways were unduly prejudiced. Judge Cusick recommended that the CAB approve the IATA agreement subject to the condition that Boston, Philadelphia, Baltimore, and Washington be common rated with New York and that rates to other interior gateways be equal per mile to those rates in effect at New York. (Joint App. 14a).

The CAB exercised its right of discretionary review of the Judge's decision. The CAB agreed with the Judge that the North Atlantic rate structure was unlawful. (Order 73-2-24, Joint App. 86a). It found, however, that the lawful rate structure was one where the rates between the interior gateways and Europe are equal per mile to the New York-Europe rates. Common rating was rejected as an unreasonable rate structure because it

[1] Subsequently the CAB expanded the case to include the issue of undue preference and prejudice vis-a-vis New York at Philadelphia, Cleveland, Detroit, and Chicago as well as at Boston, Baltimore, and Washington. For convenience and to distinguish between these seven cities and New York, the former are hereinafter referred to as "interior gateways."

was not related to cost, was contrary to CAB precedent, and resulted in unduly preferential and prejudicial rates. Upon the request of several of the interior gateway cities the Board reconsidered its decision. In Order 73-7-9 (Joint App. 121a) the Board affirmed its earlier Opinion and Order.

Pursuant to Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486, Petitioners sought review of the CAB's Orders in the court below. Petitioners argued that the undue preference and prejudice found by the CAB could only be corrected by common rating Boston, Baltimore, and Washington with New York. The court rejected the Petitioners' contention and affirmed the CAB's Orders.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT THE CAB DID NOT EXCEED ITS STATUTORY AUTHORITY OR ACT ARBITRARILY IN REQUIRING, AS A CONDITION OF APPROVAL OF IATA RATE AGREEMENTS, THAT THE CARRIERS USE COST RELATED EQUAL PER MILE RATES

A. Cost Related Equal Per Mile Rates Are Not Unduly or Unreasonably Preferential or Prejudicial or Unjustly Discriminatory

Section 404(b) of the Federal Aviation Act prohibits *undue* or *unreasonable* preference, *unjust* discrimination, or *undue* or *unreasonable* prejudice to any person, port, locality, or description of traffic. Equal per mile rates do not violate this standard.

The mileage related North Atlantic rate structure prescribed by the CAB is related to cost of service. This is the most reasonable and just method of pricing any service. In this manner each consumer pays his fair share of this cost of service.

Cost of providing air transportation services is directly related to mileage flown. This was demonstrated in the record before the CAB and the court below so found (Joint App. 8a). Petitioners do not challenge this finding here. Costs do not warrant the lower per mile rates for more distant points which Petitioners in effect seek. Indeed, in longhaul air transportation such as on the North Atlantic costs per mile tend to increase with distance. A recent CAB decision prescribing the fare structure for domestic passenger transportation found that, although the cost per mile decreases between 100 and 2,500 miles, the cost per mile actually *increases* for trips over 2,500 miles.[2] If anything the CAB's mileage based rate structure already prefers Petitioners. It certainly does not *unjustly* discriminate against or unduly prejudice Petitioners.

One of Petitioners' arguments-in-chief before the Administrative Law Judge was that the rate structure found to be unlawful was discriminatory because Baltimore and Washington shippers had an incentive to truck North Atlantic shipments to/from New York. Nowhere here or below was this argument asserted. It is not asserted because the incentive no longer exists. Any undue prejudice-in-fact has been eliminated.

B. Petitioners' Comparison of Rates Between Disparate Cities Fails to Demonstrate that the CAB Acted Arbitrarily or Capriciously

Petitioners place heavy reliance on the argument that different rates per mile between disparate city-pairs (*e.g.*, New York-Rome vs. Washington/Baltimore-Munich) creates an unlawful preference. The court below correctly held that such a difference in rates does not

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[2] *Domestic Passenger-Fare Investigation, Phase 9—Fare Structure*, Order 74-3-82, March 18, 1974, at App. 4. The shortest distance across the North Atlantic, Boston-Shannon, is 3,048 miles.

create undue preference or prejudice as between U.S. cities.

To compare disparate city-pairs, as stated by the court below, is "to compare apples with oranges." That rate differential is irrelevant. The Washington/Baltimore shipper competing with a New York firm for a Munich market compares Washington/Baltimore-Munich rates with New York-Munich rates. If the market is Rome, he would then compare Washington/Baltimore-Rome with New York-Rome. In both comparisons the rates are equal per mile. As correctly reasoned by the court below, traffic will not be diverted from Washington/Baltimore to New York because of rate differentials between disparate pairs of cities. No preference or prejudice results from these immaterial differentials. Any undue preference or prejudice was eliminated by the prescription of equal rates per mile for like city-pairs (*e.g.*, New York-Rome vs. Washington/Baltimore-Rome).

II. THE COURT BELOW CORRECTLY HELD THAT THE CAB WAS NOT REQUIRED AS A MATTER OF LAW TO PRESCRIBE COMMON RATES, AND DID NOT ABUSE ITS DISCRETION OR ACT ARBITRARILY IN REFUSING TO REQUIRE COMMON RATES FOR U.S. GATEWAYS

A. Absent Special Circumstances the CAB Has Consistently Refused to Permit Common Rates and Properly Refused to Impose Common Rates Here

For the past twenty-five years, the CAB has steadfastly refused to impose common rates. CAB policy "does not favor such rates on the ground that charging the same rate for a longer distance as for a shorter one is unsound and not justified under the Act." (Joint App. 106a). The CAB has required common rates in two iso-

lated cases, and then only for two very specialized markets.[3] In certain limited cases carrier-established common rates have been permitted. Such rates are condoned only where special circumstances can be shown to exist.[4]

Petitioners assert that Baltimore and Washington have been deprived of their geographic advantages vis-a-vis New York by common rating in markets other than the North Atlantic. This is erroneous as a matter of fact. Even though there is little direct service between Washington and South and Central American destinations, in many instances rates at the more distant City of New York are higher than at Washington.[5] The U.S. coast-to-coast long-haul air freight rate structure is not common rated. In every instance New York shippers pay higher rates for cargo shipments to the West Coast than shippers at less distant Baltimore and Washington.

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[3] Because of circumstances peculiar to intra-Hawaiian air transportation the CAB conditioned certification of Mainland-Hilo passenger service on the establishment of common fares. *Hilo-Mainland Temporary Service Investigation*, 47 C.A.B. 749 (1967). A prime purpose of that common fare arrangement was the protection of local Hawaiian carriers. In the *Pacific Service Rate Case*, 24 C.A.B. 629 (1957), *modified and aff'd sub nom. Pan American World Airways, Inc.* v. *CAB*, 256 F.2d 711 (D.C. Cir.), *cert. denied*, 358 U.S. 836 (1958), the CAB established common rates for mail destined to Tokyo from Seattle and San Francisco for the protection of transpacific air carriers. In neither case was undue preference or prejudice argued or considered.

[4] *See Hawaiian Common Fares Case*, 10 C.A.B. 921 (1949) and 37 C.A.B. 269 (1962), where the CAB initially prohibited even carrier-initiated common rates. Subsequently, while refusing to impose common rates, the CAB permitted carriers to file tariffs containing common rates because "special circumstances" had been demonstrated. Petitioners cite *Theodore Mfg. Corp.*, Order No. E-22710, September 30, 1965, as supporting the imposition of common rates. The rate there was carrier-established, and not Board imposed.

[5] Pan American's certificate prevents it from providing nonstop service between Baltimore and points in South and Central America.

The court below properly found that the CAB's decision establishing an equal per mile North Atlantic rate structure is consistent with the CAB's historical opposition to common rates. That policy has not been altered and is based on the principle that equal charges for service over different distances is unsound. In the limited instances where common rating does exist it has been permitted because of special circumstances.

B. The Decision of the Court Below Does Not Conflict With This Court's Standards for Review of Agency Determination of and Remedies for Unjust Discrimination

The CAB acted well within the limits of its authority as delineated by this Court, and the lower court properly held that the CAB did not abuse its discretion. A great deal of discretion is entrusted to an administrative agency when it prescribes a remedy for undue preference and prejudice. Such decisions will not ordinarily

> be disturbed by the court except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Board of Trade of Kansas* v. *United States*, 314 U.S. 534, 546 (1942); *see also Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949); *New York* v. *United States*, 331 U.S. 284, 347 (1947).

Petitioners do not allege that the CAB has transgressed any of the above guidelines. Instead it is maintained by Petitioners that, because the ICC has approved common rating, the CAB is compelled to require it in the instant case. Not only is Petitioners' claim erroneous, but a CAB decision based on such grounds would be arbitrary, capricious, and an unreasonable exercise of discretion.

The court below properly found that the CAB lawfully exercised its discretion in eliminating undue preference and prejudice, notwithstanding any asserted theory of rail rate regulation. Congress recognized the fundamental difference between economic regulation of rail and air transportation when it rejected ICC jurisdiction over aviation and created a separate independent agency. *See* C. Rhyne, *The Civil Aeronautics Act Annotated*, xvi, 43-44 n.129, and *C & S Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 107 (1948).

Theories of rail regulation simply do not apply to air transportation rate regulation. The court below, the CAB, and economists recognize differences in rail and air transportation costs. Because of these differences, the ICC, in regulating rates, places far less emphasis on distance than does the CAB. As stated by the court below: "Unit costs of railroad operations do not tend to increase with distance nearly as much as in air carrier operations." (Joint App. 8a). This proper factual finding supports the CAB's rejection of common rates in this case. The CAB, after analysis of the cost structure of the air transportation industry, imposed a set of rate and cost policies reflecting considerations peculiar to air transportation, resulting in a reasonable North Atlantic rate structure free of discrimination or preference.

C. Decisions of the ICC Do Not Conflict With the Holding of the Court Below

Petitioners erroneously assert that ICC decisions require the rejection of distance as a judgment factor in cases of undue preference and prejudice. ICC precedent does not support that assertion. The Interstate Commerce Act has not been interpreted to *require* common rating to eliminate unjust discrimination or as *requiring* the ICC to deprive a locality of its geographic advantages. The decisions interpreting the Interstate Commerce Act

have held that the ICC could in fact require departure from the system of common rates which it has at times "tolerated." *New York Central R.R. Co.* v. *United States*, 207 F. Supp. 483, 492 (S.D.N.Y. 1962).

Petitioners seek to argue that the cases relied upon by the court below did not deal with "ports" and are therefore not dispositive. Nothing in the legislative history of the Interstate Commerce Act and its amendments, nor anything in court decisions, requires the ICC to treat ports any differently than other localities in deciding discrimination issues.[6] The ICC has frequently held distance to be the deciding factor in finding, and requiring elimination of undue preference and prejudice. See *New York* v. *United States*, 331 U.S. 284 (1947), where this Court upheld ICC action requiring the elimination of different rates for the same distance.[7]

ICC precedent does not require the elimination of natural geographic advantages. This Court has held that the Interstate Commerce Act "does not attempt to equalize

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[6] *Boston and Maine R.R.* v. *United States*, 202 F. Supp. 830 (D. Mass. 1962), *aff'd by an equally divided court*, 373 U.S. 372 (1963). This Court has not specifically ruled on the issue sought to be raised by Petitioners. However, in interpreting a 1940 amendment, similar to the 1935 amendment to the Interstate Commerce Act which added "ports" to the anti-discrimination provision, this Court held that the addition to Section 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1)) of the words "region, district, territory," "did not introduce a new standard of discrimination in section 3(1)." *New York* v. *United States*, 331 U.S. at 300.

[7] See also *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830-831 (1973), where the ICC stated: "Distance, other things being equal, is the best measure of the transportation service actually performed . . ." *Id.* at 833; *Grain Groups I & J Origins to Pacific Coast*, 299 I.C.C. 129, 134 (1956); ". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations", *Paper from the South and Southwest*, 218 I.C.C. 202, 216 (1936); *Apples and Pears from Oregon and Washington*, 181 I.C.C. 579, 591 (1932).

fortune, opportunities, or abilities." *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911). The court below properly held that the anti-discrimination provisions of the Interstate Commerce Act and the Federal Aviation Act were not designed to eliminate natural advantages of geographic location. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216 (1951); *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924).

D. Common Rating of Baltimore and Washington With New York Would Result in Unjust Discrimination Against and Undue Prejudice to Other Gateway Cities

Petitioners argued below that the proper remedy would be to common rate Baltimore and Washington with New York. This conflicts with the CAB's determination to require equality of treatment for *all* the gateway cities at issue. Common rating of Baltimore and Washington with New York would result in unjust discrimination against the other cities receiving direct service in the North Atlantic market.

Petitioners failed to recognize the effect of common rating only some of the cities. Cleveland, for example, would be unduly prejudiced. As noted by the court below, the Cleveland-London mileage is only 3.2 percent greater than the Baltimore-London mileage. If common rating were adopted for Baltimore/New York, the Cleveland rate per mile would be 12.3 percent greater than the Baltimore rate.

Petitioners now state that all the cities should be common rated. The logical—and absurd—extension of this philosophy would be to common rate the entire United States by excluding distance and cost as significant rate-making factors. This is not an acceptable substitute for the CAB disposition.

What Petitioners have suggested, by calling for the common rating of "competing ports," is that a new unlawful discrimination should be created in favor of their cities. Petitioners would unduly prefer the Washington/Baltimore shipper by permitting that person to pay the same rate as the Boston shipper, although cargo from Washington/Baltimore must travel over 380 miles *farther*. The CAB merely applied the reasonable distance and cost factors to insure a rate structure which does not unduly prefer or prejudice *any* gateway city.

Common rating of Baltimore and Washington with New York would result in those cities receiving more transportation for less money. Discrimination in fact and law is produced when equal charges are levied for unequal service. *New York Central R.R. Co.* v. *United States*, 207 F. Supp. at 490.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1974

SUPREME COURT, U. S. Nos. 74-233 and 74-234

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD, et al,

THE COMMONWEALTH OF VIRGINIA, et al,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD, et al,

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, CITY OF CHICAGO, BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WAYNE, MICHIGAN, CITY OF DETROIT, AND GREATER DETROIT CHAMBER OF COMMERCE,

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

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THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND,

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Chicago Association of Commerce and Industry; City of Chicago; Board of County Road Commissioners of the County of Wayne, Michigan; City of Detroit;[1] and Greater

[1] City of Detroit was a respondent in the Court of Appeals through the Detroit Aviation Commission, a department of the City of Detroit.

Detroit Chamber of Commerce, respondents below, submit the following brief in opposition to the petitions for a writ of certiorari filed by Department of Transportation of the State of Maryland (Maryland), and jointly by the Commonwealth of Virginia (Virginia) and the Metropolitan Washington Board of Trade.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 498 F.2d 129 and appears in the joint appendix to the petitions herein (JA), pages 2a-13a. The orders and opinions of the Civil Aeronautics Board appear in the joint appendix, pages 86a-135a.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the orders of the Civil Aeronautics Board, prescribing a mileage formula of air cargo rates between certain United States gateways and European points to eliminate undue preference and prejudice found to exist as between New York, on the one hand, and Baltimore-Washington, Philadelphia, Boston, Chicago, Detroit, and Cleveland, on the other hand, are within the statutory authority of the Board, are supported by adequate findings based upon substantial evidence of record, and have a rational basis in fact and law.

STATUTES INVOLVED

Federal Aviation Act of 1958:

Section 404(b), 49 U.S.C. §1374(b):

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference

or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 1002(f), 49 U.S.C. §1482(f):

> Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice.

STATEMENT OF THE CASE

On March 13, 1969, the Civil Aeronautics Board (the Board), upon complaint of the City of Baltimore, entered into an investigation to determine whether or not the trans-Atlantic air-cargo rate structure was unduly preferential to New York and unduly prejudicial to Baltimore-Washington. The investigation was subsequently broadened to include a determination of whether such undue prejudice in rates also extended to Philadelphia, Boston, Chicago, Detroit, and Cleveland. Among the parties intervening in the investigation were the Chicago and Detroit parties filing this brief.

The trans-Atlantic air-cargo rate structure was prescribed by resolutions of the International Air Transport Association (IATA), which consists of the foreign flag air carriers serving the United States and all United States flag carriers serving Europe except Seaboard World Air Lines. Between 65 percent and 85 percent of all trans-Atlantic cargo tonnage moves under specific commodity rates. The remainder of such tonnage moves under general commodity rates or container rates. All of the cities which were parties to the proceeding are points which are authorized to receive non-stop service to and from Europe on the certificates of one or more of the air carriers, and all were receiving direct single-plane service to and from points in Europe at the time of the investigation. (JA, pp. 22a-24a, 91a)

When the Board instituted its investigation, however, the trans-Atlantic air-cargo rate structure did not reflect the direct service actually being rendered to and from Europe from and to all of the cities who were parties to the proceeding. General commodity rates to and from cities other than New York were constructed by the use of arbitraries or add-ons to the New York-London base rate. Specific commodity rates were published as through rates to New York from all European points to which the rate applies and other United States cities were able to take advantage of these rates only by combining therewith the lowest available domestic rate or combination of rates from the city in question through New York. The IATA carriers published arbitraries to be added to the New York-European point base rates for the cities of Philadelphia, Baltimore and Washington. The net result of this trans-Atlantic air-cargo rate structure was that rates per-mile to and from New York were appreciably lower than rates per-mile to and from other U.S. cities receiving direct-plane service to and from Europe. (JA, pp. 91a-92a)

Upon consideration of the evidence and the briefs and arguments of the parties thereto, the Board found that the rates under investigation were unduly preferential of New York and unduly prejudicial to the other cities, and it ordered the carriers to remove such undue preference and prejudice by establishing rates based on a mileage formula, structuring the rates on the New York-European rate per-mile as applied to the direct mileage between the European point and the American point involved. (JA, p. 90a)

In so ordering, the Board modified the initial decision of its administrative law judge who had heard the case. He, too, had found that the existing trans-Atlantic air-cargo rates unduly preferred New York and unduly prejudiced the other cities, but he would have removed such preference and prejudice by establishing the same air-cargo rates on trans-Atlantic traffic to and from New York, Baltimore-Washington, Philadelphia and Boston (i.e., by establishing common rating at such points) and by structuring trans-Atlantic air-cargo rates to and from Chicago, Detroit and Cleveland by establishing combinations over New York, adding to the European-New York rates a factor based upon the mileage between the interior cities and New York at the New York-London rate per mile. (JA, pp. 71a-72a, 90a) This would not have given Chicago and Detroit the benefit of their direct air mileage. One reason why the Board rejected Judge Cusick's solution is that "common rating would not eliminate the inequities in the North Atlantic freight rates, but would merely create a new set of preferences and prejudices" (e.g. as between Baltimore-Washington, on the one hand, and Detroit and Chicago on the other). (J.A. pp. 106a-107a)

The Maryland and Virginia parties sought review of the Board's orders in the Court of Appeals for the Fourth Circuit. That court affirmed the orders.

ARGUMENT

I.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

While this is the first case to reach this court involving undue preference and prejudice in air-cargo rates under section 404(b) of the Federal Aviation Act of 1958 (Aviation Act), the petitions raise no important questions of federal law warranting review by this court. Only the routine inquiries in this type of case are presented: Whether the Board acted within the scope of its authority and whether its orders are supported by adequate findings based upon substantial evidence and have a rational basis in fact and law. The Court of Appeals considered those questions and in a well-reasoned opinion found petitioners' arguments to be without merit. (JA, p. 5a)

Petitioners present nothing to this court that was not presented to, and considered by, the Court of Appeals. Petitioners are simply dissatisfied with the manner in which the Board removed the undue preference and prejudice found to exist. The thrust of petitioners' arguments is that Baltimore-Washington should be common-rated with New York, notwithstanding New York is 190 miles closer to European cities than Baltimore-Washington. Administrative Law Judge Cusick, who heard the case, agreed with the Maryland and Virginia parties on that point, but the Board did not adopt his recommendation, for reasons which it thoroughly explained. Petitioner Maryland states (Pet., p. 5):

> Petitioner sought unsuccessfully in the court below and seeks here, to reinstate the remedy adopted by Judge Cusick.

In similar vein, petitioner Virginia states (Pet., p. 2) as its first question for review:

> Whether the . . . Board . . . should have removed the unlawful preference and prejudice and protected the competitive interests of ports and shippers by equalizing the rates at those competing ports.

Clearly such questions do not present any important question of federal law and do not warrant review by this court. Courts will not substitute their judgment for that of the agency on matters within the discretion of the agency. Particularly is this true when a court is asked to review an agency's fashioning of discretionary relief. *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457; *Virginian Ry.* v. *United States,* 272 U.S. 658, 663; *Georgia Commission* v. *United States,* 283 U.S. 765, 775; *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619-621.

Petitioner Maryland states (Pet., p. 2) that the question presented is—

> Whether, having found that the shippers of air freight in Maryland directly compete with those in the New York area for European business, the Civil Aeronautics Board must as a matter of law require equal rates between both areas and Europe.

Although framed as if this were a legal question, petitioner points to no statutory language, court decisions, or other facts to support an argument that the Board is required "as a matter of law" to disregard distance and service and common-rate Baltimore-Washington with New York. Instead, as it itself states, it simply argues that the Board should have adopted a different remedy, i.e., the one favored by Judge Cusick, for eliminating the undue preference and prejudice found to exist.

There is nothing in sections 404(b) or 1002(f) of the Aviation Act which would limit the discretion of the Board as to the manner of removing undue preference and prejudice or require it to adopt any particular remedy, such as common-rating, in this case. Nor, as we show in the following sections of this brief, are there any court decisions which would require the Board to common-rate Baltimore-Washington with New York as a matter of law. Although this is the first case to reach this court involving air cargo rates under section 404(b), that section is patterned almost word for word on section 3(1) of the Interstate Commerce Act, enacted in 1887, and hundreds of cases involving that section have been before the courts. Many of the leading decisions of this court have involved that section, but not a single decision of this court can properly be relied on as authority for the proposition that section 404(b) of the Aviation Act requires common-rating of Baltimore-Washington with New York as a matter of law.

II.

THE DECISION BELOW IS CLEARLY CORRECT

After full consideration of all petitioners' arguments, which arguments are simply repeated here, the Court of Appeals found (JA, p. 5a) that "the Board did not exceed its statutory authority or act arbitrarily or unreasonably in prescribing the mileage rate".

Petitioners' argument that common-rating of Baltimore-Washington with New York is required as a matter of law depends on the premise that anything other than common-rating is unduly prejudicial to Baltimore-Washington as a matter of law. Such an argument flies directly in the face of the decisions of this court. Like section 404(b) of

the Aviation Act, section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1), prohibits undue preference and prejudice, but does not specify what particular facts or circumstances are essential to the existence thereof. What those circumstances are is left to the agency to determine. It was so held in *United States* v. *Trucking Co.*, 310 U.S. 344, 353:

> . . . the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.

What shall be determined to be undue prejudice and preference is a question of fact, not of law. *Interstate Commerce Comm'n* v. *Alabama Midland Ry.*, 168 U.S. 144, 170; *Texas & P. R. Co.* v. *Interstate Commerce Comm'n*, 162 U.S. 197, 219; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593. Whether rate disparities are justified by differences in circumstances and conditions or whether they are not is for the agency to decide. *Barringer & Co.* v. *United States*, 319 U.S. 1, 7; *New York* v. *United States*, 331 U.S. 284, 347; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482.

In determining whether the rates under investigation resulted in undue preference and prejudice, the Board followed substantially the same criteria as those followed by the Interstate Commerce Commission (ICC).[2] It found (JA, pp. 92a-93a):

> The parties do not dispute that a *prima facie* case of undue preference and prejudice is established upon a

[2] Cf. *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830-831.

> showing: first, that the traffic moves under a rate structure which prejudices one party while preferring another; second, that a competitive relationship exists between the prejudiced and preferred parties; third, that the preference and prejudice is of an undue character; and fourth, that such preference and prejudice has resulted in economic injury to the prejudiced party.

The Board found the existence of these elements. It found the existence of significantly higher per-mile rates to and from the other gateways (including Chicago and Detroit) than to and from New York (JA, p. 95a). It found the existence of competition between the other gateways and New York and that the rate disparities had contributed to the diversion of traffic to New York (JA, p. 99a). It found that the carriers had failed to justify the disparities in the rates (JA, p. 99a).

Having properly found the existence of undue preference and prejudice, the Board elected to remove it by putting New York and all interior gateways on the same rate per-mile, using the existing rate between the European point and New York as a basis. It found (JA, p. 100a):

> Where the Board has found direct service to be in the public interest, the rate structure should reflect the availability of those services. Carriers not providing direct service cannot be permitted to deny the shipping public the benefits accruing from the direct services provided by other carriers.

The Board's method of removing the undue preference and prejudice was explained as follows (JA, pp. 104a-105a):

> We are in agreement with those who except to common-rating. We find that the existing preference and prejudice ought to be removed by requiring respondent carriers to file tariffs providing rates equal on a

> per-mile basis, for both specific commodity rates, container rates, and general commodity rates, to and from all gateway points at issue in this proceeding, and points in Europe.

In support of its prescription of mileage-based rates, it found (JA, p. 111a):

> Since costs tend to vary with miles flown, basing rates upon mileage will produce a more cost-based rate structure than either the current system or common rates. In addition, mileage-based rates preserve to each gateway the relative advantages of its geographic location.

It also found that "basing rates upon mileage at a rate per mile will eliminate the cause of the undue preference New York is currently receiving." (JA, p. 111a)

The Board thoroughly considered petitioners' arguments that Baltimore-Washington should be common-rated with New York, but rejected that contention, among other things for the reason that common-rating "would create a new set of preferences and prejudices" (JA, pp. 106a-107a), and found (JA, p. 108a) that there was—

> . . . nothing in the record which would justify imposing a rate structure which would provide lower per-mile rates to Philadelphia, Baltimore and Washington than to the other gateways and which at the same time would require a rate increase at all points in order to prevent the lowered yields from adversely affecting carriers' earnings.

Since undue preference and prejudice result from rate disparities which do not properly reflect transportation conditions, it is difficult to imagine how requiring mileage-based rates could be said to be an irrational method of removing such preference and prejudice.

We submit that the relief fashioned by the Board is within its discretion, is eminently rational, and is fully in accord with a long line of precedents under section 3(1) of the Interstate Commerce Act, and that the reasons for its action were fully explained by the Board. Whether the Board might also have been justified in common-rating Baltimore-Washington with New York, or whether this court, had it been sitting in the Board's place, would have adopted such common-rating are not relevant inquiries here.

III.

THERE IS NO CONFLICT OF DECISIONS

No case decided under section 3(1) of the Interstate Commerce Act cited in either petition is authority for the argument that the Board is required to common-rate Baltimore-Washington with New York as a matter of law. As the Court of Appeals correctly noted (JA, p. 8a, n. 6), the ICC has given full recognition to distance as a significant factor supporting differences in rates. All cases there cited were port cases. There are many others. This is not to say that the ICC has not, in individual cases, approved or required equalization, but this has *never* been done as a matter of law, only upon the facts of individual cases.

Nevertheless, petitioner Virginia argues (Pet., pp. 11, 15) that the decision below conflicts with *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830, affirmed by an equally divided court, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372, and *New York* v. *United States,* 331 U.S. 284.

In the *Boston and Maine* case, a three-judge district court set aside an ICC order finding that certain rates voluntarily established by the carriers to equalize compet-

ing ports were unduly preferential and prejudicial. The reasons why the order was set aside are complex and are stated in the opinion, but petitioner misstates the holding in the case when it says that the court "required the rates between competing ports to be common rated". Nothing in the opinion so holds, and neither the ICC nor, to our knowledge, any court has so construed that opinion. As the ICC said, in *Paper, Central Territory to North Atlantic Ports,* 329 I.C.C. 281 (1966), 291,

> We decline . ... to attribute to the decision in *Boston and Maine Railroad* v. *United States, supra,* any principle of absolute equalization between ports.

In that case, in fact, the ICC refused to permit equalization of rates on paper to other north Atlantic ports with those to Baltimore, the distance-favored port.

Further, the *Boston and Maine* case involved a voluntary attempt by the carriers to equalize rates and did not involve forced equalization. See 202 F. Supp. at 837. Here no carrier desires voluntarily to equalize Baltimore-Washington with New York, as the Board recognized (JA, p. 106a). The question here is whether the carriers should be compelled to disregard substantial differences in distance, an entirely different situation.

In *New York* v. *United States,* this court upheld the ICC's orders in *Class Rate Investigation, 1939,* 262 I.C.C. 447, 264 I.C.C. 41. In that case the ICC had under investigation all classification descriptions and related class rates throughout all the United States east of the Rocky Mountains. It found the existing rates and classifications to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act as well as unduly preferential and prejudicial in violation of section 3(1). 262 I.C.C.

at 700-701. It found that class rates throughout this area should be uniform. Utilizing its power to prescribe rates under section 15(1) of the Act, it prescribed a scale of mileage-related rates to be applied uniformly throughout the area.

Petitioner Virginia attempts to take certain portions of this court's opinion in *New York* v. *United States* out of context when it asserts (Pet., p. 15) that this court held that "the charge of a higher rate to one shipper than another for an equal number of miles of transportation constitutes discrimination." The ICC did not hold in that case, nor did this court, that merely charging one shipper a higher rate than it charged another for the same number of miles constitutes discrimination. The ICC has always required the showing of a competitive relationship as one essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act. See *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 831.

In no way is the Board's decision here contrary to *New York* v. *United States*. Petitioner's argument that the Board did not eliminate all the outstanding preference and prejudice is based on a comparison of unrelated rates having no common origins or destinations or any proven competitive relationships. The Court of Appeals properly called this a comparison of "apples with oranges." (JA, p. 12a) This, of course, is not to say that the situation to which petitioner refers is necessarily proper or justified. The point is that that situation cannot militate against the validity of the orders here involved. The Board's doors are always open to parties who may have a complaint on that score.

CONCLUSION

We submit, for the reasons above stated, that these petitions present no important questions of federal law, that the decision below is clearly correct, and that there is no conflict of decisions. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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October 24, 1974

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In the Supreme Court of the United States

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v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 498 F. 2d 129. The decision, supplemental opinion and order on reconsideration of the Civil Aeronautics Board (Pet. App. 86a-135a), and the initial decision of the Adminstrative Law Judge (Pet. App. 14a-85a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1974. The petitions for writs of certiorari were filed on September 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, after concluding that the existing transatlantic air cargo rate structure unduly preferred New York and unduly prejudiced other east coast and near midwest cities in violation of Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1374(b)), exceeded its statutory authority or acted arbitrarily or unreasonably in prescribing a mileage-based formula instead of adopting a common rate formula to the east coast cities.

STATUTES INVOLVED

Sections 3 and 216(d) of the Interstate Commerce Act, 24 Stat. 380, 49 Stat. 558, as amended and added, 49 U.S.C. 3(1), 316(d), are set forth at Pet. App. 137a-138a. Sections 102(c), 402, 404(b) and 1002(f) of the Federal Aviation Act of 1958, 72 Stat. 740, 757, 760, 789, 49 U.S.C. 1302(c), 1372, 1374(b) and 1482(f) are set forth at Pet. App. 136a-137a.

STATEMENT

Transatlantic air cargo rates are established by filing tariffs with the Civil Aeronautics Board under Section 403 of the Federal Aviation Act, 49 U.S.C. 1373.[1] Rates so

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[1]The rates embodied in these tariffs are fixed by agreement among the members of the International Air Transport Association ("IATA"), a trade organization of domestic and foreign air carriers engaged in scheduled international air transportation.

established are subject to alteration by the Civil Aeronautics Board, if they are unjustly discriminatory, unduly preferential, or unduly prejudicial, under Sections 404(b) and 1002(f), 49 U.S.C. 1374 and 1482(f).

1. *The Initial Decision.* In March 1969, the Board instituted an investigation to determine whether the transatlantic air cargo rate structure established by IATA unduly prefers New York and unduly prejudices Boston, Washington, Philadelphia, Baltimore, Cleveland, Detroit and Chicago. After evidentiary hearings, the Administrative Law Judge issued an initial decision that the transatlantic rate structure unduly prejudices the other named municipalities. He found that for almost every specific commodity rate, the rate per mile was lower for shipments through New York than the equivalent rate for shipments through the other cities; that the lower New York rates encouraged a substantial volume of cargo to move to and from New York by truck rather than by air through the gateway city nearest the shipper; and that, as a result, New York has become a far more important gateway for European air cargo than it otherwise would have been (Pet. App. 56a-63a).

The Administrative Law Judge ruled that the public interest required a common transatlantic cargo rate between Europe and New York, Boston, Philadelphia, Baltimore, and Washington, D.C.,[2] but that the rates for the segments between New York and Detroit, Chicago, and Cleveland should be based upon the mileage at the New York-London rate per mile. The Judge deemed a mileage-based rate structure to all points to have "merit" and to be a lawful remedy under Section 1002(f) (Pet. App. 67a); however, he concluded that common rating the five east coast cities would better encourage decentralization of the North Atlantic cargo flow.

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[2]Common rating several points means making the rates between those points and another point (in this case, Europe) the same.

2. *The Board's Final Decision.* The Board on its own motion reviewed the initial decision. In its final decision, it agreed with the findings and conclusions of the Administrative Law Judge concerning the unlawfulness of the rate structure, but rejected his proposed remedy. Instead, it directed the establishment of rates computed by multiplying the New York-European point rates per mile by the distance in miles between the various United States gateway points and the point in Europe. The Board concluded that common rating would not serve to eliminate inequities in the rate structure, but would instead establish a new set of prejudices and preferences. It also concluded that a common rate structure would result in an overall increase in transatlantic cargo rates to compensate for reduced revenues and decreased yields for transatlantic carriers due to reduction of rates at gateways other than New York to the level of New York (Pet. App. 106a-107a).

The Board stressed that the most equitable and practical rate structure is one based on mileage (Pet. App. 111a):

> Since costs tend to vary with miles flown, basing rates upon mileage will produce a more cost based rate structure than either the current system or common rates. In addition, mileage-based rates preserve to each gateway the relative advantages of its geographic location.

3. *The Decision of the Court of Appeals.* On petition for review by the Commonwealth of Virginia and the Department of Transportation of the State of Maryland, the court of appeals unanimously affirmed the Board's order. The court concluded that the Board had a large measure of discretion in choosing the measures to remedy undue preference and undue discrimination. Upon its review of the record, the court found "substantial evidentiary support" for the Board's order (Pet. App. 8a),

and determined that the order was a reasonable exercise of the agency's discretion and was within its statutory authority (Pet. App. 5a, 9a).

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The Board, upon finding that the existing rate structure was unlawful, was faced with two possibilities—common rating or mileage-based rates—both of which in the opinion of the Administrative Law Judge had merit. The Board weighed the advantages and disadvantages of each, and, applying its expertise, prescribed mileage-based rates as preferable in the public interest. This case involves only a dispute over the wisdom of that choice. Congress has left such questions to the discretion of the Board; nothing in the Federal Aviation Act requires the Board to adopt one formula or the other.

Petitioner's argument asks this Court to substitute its view of the preferable public policy for the Board's in a technical area which has long been recognized to be within the exclusive expertise and discretion of the agency. This Court has rejected a similar claim with respect to the Interstate Commerce Commission's choice of remedy under the comparable "undue preference or prejudice" clause of Section 3 of the Interstate Commerce Act, 49 U.S.C. 3(1) (*Board of Trade* v. *United States,* 314 U.S. 534, 546):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * * and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to

> be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481 * * *."

The court of appeals correctly applied this test.

The Board's order was within its statutory authority. In contrast to its authority over domestic rates (Section 1002(d), 49 U.S.C. 1482(d)), the Board has no authority initially to prescribe international rates. However, it may alter them to correct undue preferences or prejudices. Section 1002(f).

2. Petitioners also contend that the decision below conflicts with Sections 3 and 216 of the Interstate Commerce Act, 49 U.S.C. 3 and 316, and court decisions interpreting them. They reason that because the Commerce Act served as a model for Section 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b), the two statutes should be applied in the same way.

This argument is without merit for several reasons. First, the decision below is not in conflict with the Interstate Commerce Act. Section 3 of that Act has been consistently applied to reflect distance and cost-of-service considerations. *United States* v. *Illinois Central R. R.*, 263 U.S. 515; *Maritime Association, Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539.

Second, as pointed out by the Board (Pet. App. 109a) and the court below (Pet. App. 8a), substantial differences exist in the cost structure of rail and air transportation.[3] These differences cause rates on mileage

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[3]The rail industry is characterized by increasing returns to scale (low variable costs and high fixed costs which cause average costs to decrease as distance increases), while the airline industry is charac-

more nearly to reflect cost of service in the airline industry than in the railroad industry. Consequently, the Board properly required that differences in distance be reflected in differences in rates.

Third, Congress did not intend, in the anti-discrimination provisions of either act, to deprive a locality of the relative advantages of its geographic location. *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 228. "The law does not attempt to equalize fortune, opportunities or abilities." *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U.S. 42, 46.

Fourth, the common theme of the ICC cases petitioners cite is that equalizing the rates of rail cargo movements would encourage a shift in rail cargo traffic to the disadvantaged ports.[4] Here, however, the Board found that it was mileage-based rates which will "tend to reduce the amount of North Atlantic cargo currently by-passing other gateways in favor of New York * * * and * * * we cannot find the record establishes that only common rates would effectuate such a result" (Pet. App. 111a-112a).

3. Substantial evidence supports the Board's determination that "the most equitable and practical rate structure is one based upon mileage" (Pet. App. 111a). The evidence showed that major costs of air transportation tend to vary with miles flown (Pet. App. 109a). Common rating would thus not eliminate the inequities of the

terized by relatively constant returns to scale (higher variable costs which cause average costs to remain relatively constant as distance increases). Thus distance is a more significant cost factor in the airline industry.

[4] *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573; *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658.

North Atlantic freight rates, but would create a new set of preferences and prejudices (Pet. App. 106a-107a). It would also have an adverse economic impact on affected carriers by reducing their revenues for flights to the more distant points, which in turn would require compensating increases in the transatlantic rates to prevent carriers' earnings from falling below reasonable levels (Pet. App. 107a-108a).

This reasoning shows that the Board's decision was a reasonable exercise of its discretion. It concluded that in air transportation charging the same rate for a longer distance as a shorter one is generally unsound and not justified by the Act. The Board permits such rates only when special circumstances exist (Pet. App. 106a).[5]

4. Finally, the mileage rate the Board prescribed does not continue the undue preference to New York and undue prejudice against the other cities, in violation of Section 404(b).

First, the prohibitions of the anti-discrimination statute are not absolute. The word "unduly" serves a qualifying function in recognition of the fact that all parties are not similarly situated, and all cities are not equidistant from all points. More is required for illegality than the inherent disadvantages of geography; the disadvantage must be "undue" or "unreasonable."[6] Cf. *Alabama Great Southern R. Co., supra.*

Second, the Board's formula does not continue the undue preference and undue prejudice even though there is some variance in certain per-mile rates from the United States

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[5]See, *e.g., Hawaiian Common Fares Case*, 37 C.A.B. 269; cf. Section 4, Interstate Commerce Act, 49 U.S.C. 4.

[6]*Texas & Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197, 219.

gateways to different European points. The important criterion is the per-mile rate between United States gateways and the same European point. Here the per-mile rates are substantially the same.

Third, the fact that European points are common rated within prescribed zones,[7] while United States points are not, does not result in undue preference or undue prejudice to the United States. The Board found no evidence that common-rating points in Europe adversely affect United States shippers or ports (Pet. App. 110a). As the court of appeals explained:

> [I]f, as a result of common-rating in Europe, the mileage rate from New York to a given city in Europe is two cents more or less than the rate from New York to London, it is the same two cents more or less than the rate from any other United States city to London. [Pet. App. 12a.]

Moreover, as the court below found, European common-rating practices are instituted at the insistence of European governments, and the Board cannot alter those practices (Pet. App. 12a).

In sum, the Board's formula removes the undue preferences and prejudices in the existing transatlantic cargo rate structure without ...terposing new preferences and prejudices. The Board's order was a reasonable exercise of its statutory responsibilities under Section 1002(f) to alter rates "to the extent necessary to correct" the undue preferences and prejudices.

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[7]Thus, the rates between New York and Glasgow, London and Lisbon are the same; higher common rates apply between New York and Amsterdam, Paris and Madrid in the next zone (Pet. App. 73a).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-233, 74-234

THE COMMONWEALTH OF VIRGINIA, *Petitioner,*

v.

THE CIVIL AERONAUTICS BOARD, *Respondent.*

REPLY BRIEF ON BEHALF OF PETITIONER THE COMMONWEALTH OF VIRGINIA

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THE COMMONWEALTH OF VIRGINIA, *Petitioner,*

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THE CIVIL AERONAUTICS BOARD, *Respondent.*

REPLY BRIEF ON BEHALF OF PETITIONER THE COMMONWEALTH OF VIRGINIA

Your petitioner contends that the decisions below present for the first time the application of the anti-discrimination statute, Section 404(b) and 1002(f) of the Federial Aviation Act of 1958, 49 U.S.C. 1374(b) and 1482(f) to the transportation of cargo by aircraft. The application of those statutes has far reaching importance to the ports and shippers.

The overriding importance of this case should not be confused or diminished by distortions of facts in the briefs in opposition designed to prevent a review by this court. We call attention to three items which are basic to the position of the opposition.

I. THE ASSERTION THAT THE RATES ARE BASED ON THE " MILES FLOWN" IS INCORRECT.

The defense of the rates formula repeated in all the briefs in opposition is that the rates are based on "miles flown", or are "mileage based" (C.A.B. Brief, pp. 4 and 7, Pan American and TWA Joint Brief, p. 3, and Chicago and Detroit Joint Brief, p. 11) that assertion is disproved by the rates shown on Table I on page 10 of the Petition and by the following comparison of rates between two U.S. gateways and the same cities in Europe. In each case Dulles has the shorter mileage but its rates are higher.

	Miles	Rates*
Detroit-Shannon	3,477	$ .89
Dulles-Shannon	3,270	.92
Detroit-London	3,755	.93
Dulles-London	3,646	.96
Detroit-Frankfurt	4,155	.97
Dulles-Frankfurt	4,042	1.00
Detroit-Rome	4,647	.98
Dulles-Rome	4,471	1.00

Source: I.A.T.A. Mileage Manual, Air Tariff Corporation, C.A.B. 26.

The assertion is also disproved by the fact that for 200 miles of additional air service beyond London to Brussels, New York shippers pay only an added $.02 per pound. But when shipments come to Dulles—200 miles beyond New York—the added charge is $.05 per pound.

It is clear the rates are not based on "miles flown."

* For 220 lbs. General Commodity Rates.

II. THE ASSERTION THAT THE ADMINISTRATIVE LAW JUDGE DEEMED THE BOARD'S FORMULA TO BE "A LAWFUL REMEDY" IS INCORRECT.

The assertion that the Administrative Law Judge deemed the Board's formula "a lawful remedy" (CAB Brief p. 3) is incorrect. The Judge found to the contrary that "it would not provide a complete remedy for the problem." (J.A. 67a-68a)

III. THE ASSERTION THAT THE RATE PRESCRIBED WILL "TEND TO REDUCE THE AMOUNT OF NORTH ATLANTIC CARGO TRAFFIC CURRENTLY BYPASSING OTHER GATEWAYS IN FAVOR OF NEW YORK" IS INCORRECT.

The assertion that the preference for New York has been removed (C.A.B. Brief, pp. 6, 7) by the rates prescribed is disproved by the flow of traffic under the new rates which shows New York now has even a higher percentage of the North Atlantic air cargo traffic than it had in the years prior to the C.A.B. decision.

U. S. FLAG CARRIER ESCEDULED FREIGHT TONS ORIGINATED

	1969		1970		3rd Quarter—1974	
	Tons	% of Tons	Tons	% of Tons	Tons	% of Tons
East Coast Gateways						
Baltimore	509	0.8	309	0.4	23	—
Washington	3,089	4.8	3,234	4.6	1,214	4.0
Philadelphia	1,576	2.4	1,208	1.7	769	2.6
New York	55,035	85.5	60,792	85.5	26,056	86.4
Boston	4,160	6.5	5,531	7.8	2,114	7.0
TOTAL	64,369	100.0	71,073	100.0	30,176	100.0

Source: Exhibit No. I AD-304, C.A.B. Form 41

It is clear therefore that the new rates have not removed the preference for New York and have borne out the earlier conclusion of the Administrative Law Judge.

These distortions should not divert the court from the basic conclusion that preference for New York and prejudice to Dulles continues unabated by the Board's decision.

We submit, therefore, that the Court grant certiorari and review the application of the discrimination statutes to the growing commerce of cargo movement in air transport.

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November 29, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-233

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

REPLY MEMORANDUM ON BEHALF OF PETITIONER

A short but emphatic reply to the Government's brief in opposition becomes necessary by reason of a direct misstatement by the Government on what is, analytically, the crucial point in this case insofar as the Court is concerned with the merits of the decision below.

The Brief for the Civil Aeronautics Board in Opposition states, with respect to the Initial Decision of Administrative Law Judge Cusick, that:

> "The Judge deemed a mileage-based rate structure to all points to have 'merit' *and to be a lawful*

> *remedy* under Section 1002(f) (Pet. App. 67a); however, he concluded that common rating the five east coast cities would better encourage decentralization of the North Atlantic cargo flow." (p. 3) (Emphasis supplied).

Judge Cusick's statement referred to was actually as follows:

> "As noted earlier, New York generally prefers that air cargo rates for the North Atlantic be based on the shortest operated mileage in the markets at issue. While this solution has some merit, *it would not provide a complete remedy* for the problem." (J.A. 67a-68a) (Emphasis supplied).

The statutory provision referred to (Federal Aviation Act, section 1002(f)) provides that when the Board finds that an international rate is unjustly discriminatory

> "the Board may alter same *to the extent necessary to correct* such discrimination * * *." (Emphasis supplied).

Thus, Judge Cusick did *not* hold that the Board's novel mileage basis would be a "lawful remedy under Section 1002(f)"; rather he held exactly the contrary, i.e., he recognized that

> "it would not provide a complete remedy for the problem",

which the Board was required by the statute to do.

The reasons why the Administrative Law Judge was clearly right in this conclusion have been summarized in our petition and will not be repeated here.

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November 29, 1974